Supreme Court, U.S.
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No. 05-45

In The
Supreme Court of the United States

ROBERT LINDERMAN,

Petitioner,

vs.

THE SAN JOSE CHARTER OF THE HELLS ANGELS MOTORCYCLE CLUB, an unincorporated association, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is the Ninth Circuit's new rule of law requiring officers to use discretion not to seize all evidence lawfully called for by a warrant consistent with Fourth Amendment jurisprudence?

II. a. Can an officer be denied qualified immunity for seizing all indicia commanded by a constitutionally particularized warrant, based on the Ninth Circuit's general statement that the Fourth Amendment prohibits "unreasonable executions of search warrants?"

b. Will the Ninth Circuit's continued reliance on general statements of the law effectively eviscerate the qualified immunity doctrine that this Court created for sound policy reasons?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

LIEUTENANT ROBERT LINDERMAN of the Santa Clara County Sheriff's Office.

THE SAN JOSE CHARTER OF THE HELLS ANGELS MOTORCYCLE CLUB, an unincorporated association, James Arnett, Marnie Arnett, Robert Brancato, Leslie Brancato, Ronald Cook, Vickie Bozzi, Fillmore Cross, Margaret Cross, Ted Demello, Deborah Van Tassel, James Elrite, Molly Elrite, Larry Gorham, Jeffrey Pettigrew, Christine Pettigrew, James Souza, Robert Vieira, Lori Vieira, James Welch, Gregory Wilkins, and Denise Wilkins.

Officer Manion,[1] Officer Newman, Officer Knox, Officer Messier, Officer Carney, Officer Nieves, Officer Little, and Sergeant Decena.

[1] City of San Jose officers are filing a separate Petition to this Court based on a different issue that was addressed in the same Ninth Circuit opinion.

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28 U.S.C. § 1331 4

28 U.S.C. § 1343 4

42 U.S.C. § 1983 4

CALIFORNIA CODES

Penal Code § 186.22 2

CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

The opinion of the Ninth Circuit is reported at 402 F.3d 962. Appendix ("App.") 1-39. The opinions of the district court are unreported. App. 40-63.

BASIS FOR SUPREME COURT JURISDICTION

The Ninth Circuit entered judgment on April 4, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. The Execution of The Indicia Search Warrants

Petitioner Lieutenant Robert Linderman ("Linderman") of the County Sheriff's Office headed an investigation into the beating death of a man at the Pink Poodle,

an Adult Men's Club. Linderman learned through his investigation that Steve Tausan ("Tausan"), a member of Respondent San Jose Charter of the Hells Angels ("Hells Angels"), committed the murder and suspected that other members were actively assisting in a coverup. App. 45.

Specifically, a security guard at the nightclub informed Linderman that the victim was harassing a nude dancer and the victim was told that the Pink Poodle employed Hells Angels as bouncers. App. 6. In response, the victim began bad-mouthing the Hells Angels. App. 6. The owner called Tausan, who arrived 10 minutes later and beat the victim to death. A witness told Linderman that members of the Hells Angels were hiding a videotape depicting the murder. App. 6. Because of confidential informants and other information learned during the investigation, the murder was thought to be gang related. App. 6.

In January 1998 a magistrate issued search warrants for nine residences and the Hells Angels clubhouse. Linderman was the affiant. The warrants sought Hells Angels meeting minute notes believed to discuss coverup efforts, a missing videotape surveillance depicting the murder, and indicia of Hells Angels gang affiliation. App. 7.

The District Attorney's Office wanted the indicia in order to obtain a sentence enhancement pursuant to California Penal Code § 186.22 establishing that the murder was committed for the benefit or at the direction of the Hells Angels street gang. App. 7-8, 13. The indicia would establish that the members had common symbols, which in turn would qualify it as a street gang. App. 4.

So far as pertinent to this Petition, the warrants signed by the magistrate each provided:

> YOU ARE THEREFORE **COMMANDED**, in the daytime, to make search of the premises . . . for the following property:
>
> * * *
>
> 2) ***Any*** evidence of membership in, affiliation with, activity of, or identity of, any gang, including but not limited to, any reference to ***"Hells Angels," "HA", "Red & White," "81", "Big Red Mac ine", "HAMC", including, but not limited to, "West Coast OM notes," "East Coast OM notes", "BHC newsletter", including, but not limited to drawings, paintings, photographs, photograph albums, videotapes, writings, furniture, furnishings, fixtures, and objects*** known, or which may appear by content, to depict or contain mention of membership in, affiliation with, activity of, or identity of, any gang, including, but not limited to, the following: names, initials, and monikers of known, or which may appear by content, to be gang members or affiliates; acronyms, logos, slogans, symbols, signs, and expressions known, or which may appear by content, to identify a gang or any of its members or affiliates; and identifying numbers, colors, and expressions of a geographic region with which a gang is known, or which may appear by content, to associate; . . .

App. 32 (emphasis added).

On January 21, 1998, Linderman, with the assistance of other police agencies, simultaneously executed the warrants. Linderman did not personally participate in

each execution. He coordinated the efforts and was available to answer questions. App. 14.

Search teams found that there were numerous items that bore evidence of Hells Angels indicia. When officers asked Linderman what to seize, he instructed them to take everything that constituted "indicia" as defined in the warrants. App. 14. Among the items seized were belts, jewelry, plaques, T-shirts, hats, watches, vests, calendars, clocks, sculptures, photographs, a mailbox, a refrigerator door with decals, and a cement portion of the driveway in front of the clubhouse containing the signatures of Hells Angels members, as well as numerous Harley-Davidson motorcycles. App. 14, 18.

B. Proceedings Below

1. District Court

The Hells Angels and certain of its members sued Linderman and others under 42 U.S.C. § 1983, claiming that the warrants lacked probable cause and that the execution violated the Fourth Amendment. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

In a prior order, the court held that the warrants contained probable cause to search for gang indicia. App. 46. But the court found, in the order now before this Court, that Linderman "directed that the warrants be executed in a manner which violated Plaintiffs' constitutional rights." App. 58. The court denied Linderman qualified immunity on this ground concluding that the law was clearly established that it was unnecessarily destructive to seize the large volume of indicia evidence, and that

a sampling was the only reasonable approach in executing the warrants. App. 41, 58-59.

2. Ninth Circuit

The Ninth Circuit, holding jurisdiction under *Mitchell v. Forsyth*, 472 U.S. 511, 525-27 (1985), affirmed the denial of qualified immunity in a 2-1 decision. The court first found that it was unreasonable for Linderman to interpret the word "any" in the warrants to mean "all," preferring instead one of several definitions in Webster's Dictionary meaning "some." App. 20. The court next found that even if "any" could be construed as "all," the warrants did not mandate that everything complying with the literal terms of the warrants be seized. App. 20, 21. Notably, the Ninth Circuit also found that Linderman was required to exercise discretion to leave items that came within the literal terms of the warrants. App. 21. Moreover, although it is unclear from the court's ruling, the court apparently also found that an officer can make an otherwise particular warrant unlawfully broad by executing it literally. App. 18, 19.

In finding that the law was clearly established, the court held that "whether a warrant has been executed effectively is tested by reasonableness from the moment of the officer's entry until the moment of departure." *Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997). App. 16. The court referred to an Eighth Circuit decision addressing a particularity challenge to warrants, which found that warrants issued for the limited purpose of obtaining evidence of gang affiliation diminish in evidentiary value the more that is seized. *United States v. Apker*, 705 F.2d 293, 302 (8th Cir. 1983). App. 18, 19. Thus, the Ninth Circuit held that the state of law provided

Linderman with fair warning that the "authority to seize indicia of evidence to support a sentencing enhancement . . . did not justify the level of intrusion and excessive property damage that occurred during the search." App. 17.

Even though Linderman did not seize any evidence outside the scope of the warrants, the court reasoned that the quantity of evidence seized was unlawful. To that end, the majority reasoned that qualified immunity did not attach because the Fourth Amendment guarantees the right to be free of unnecessarily destructive behavior beyond that necessary to execute a warrant effectively. *Liston v. County of Riverside*, 120 F.3d 965, 979 (9th Cir. 1997). App. 16, 22.

Relying on *Liston* and *Lawmaster*, the majority was satisfied that Linderman should have known that his conduct was unlawful. App. 22. In so doing, the court concluded that "[t]here need not be prior authority dealing with this precise factual situation in order to deny Linderman qualified immunity for his actions. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 739 (2002) [Other citations omitted]." App. 23.

On the issue of whether the law was clearly established, the dissent (Judge Bea) specifically concluded that the majority's rule that Linderman was required to exercise discretion in deciding how much evidence was enough had no support in the law. App. 35. Officers do not violate "plaintiffs' constitutional rights when they seize evidence pursuant to a valid search warrant." App. 38. The warrants "commanded," not authorized, Linderman to seize any evidence meeting the broad description in the warrants. The dissent stressed that Linderman was not

unreasonable in construing the warrants literally because accepted Webster's dictionary definitions of "any" also included "every," "all," and "unmeasured or unlimited in amount, number or extent." App. 33.

In particular, Judge Bea noted that the majority's reliance on *Liston* and *Apker* was misplaced. *Liston* held only that the destruction of property during the search in that case *might* have been unlawful. And *Liston* recognized that officers who execute search warrants occasionally must damage property in order to perform their duty. App. 35, 36. Unlike *Liston*, there was no allegation in this case that officers destroyed property that did not fall within the scope of the warrants. App. 37. And *Apker* addressed whether the warrant was sufficiently particularized, not whether "officers have a duty to take a representative sample of evidence in an indicia warrant." App. 37.

Moreover, Judge Bea's dissent emphasized that the majority's opinion would impose an unworkable and unreasonable burden on officers executing search warrants. "It is not the police officers' role to determine how to limit the scope of the warrant." App. 38. A contrary result would supplant the "independent magistrate['s function] to assure that there is probable cause to issue the warrant and that the warrant is drafted narrowly and the things to be seized are described with particularity." App. 38.

Finally, the dissent recognized that Linderman "was not the deputy district attorney who would try the case and was not in a position to judge whether the trial court would admit into evidence photographs of the objects instead of the objects themselves. . . . It was not Linderman's role during the simultaneous search of several

residences to pre-judge what would or would not turn out to be important." App. 38-39.

Linderman asks that the Court grant his petition for a writ of certiorari to conform the court of appeal's decision to existing Supreme Court authority, and to correct a result that – if left undisturbed – will lead to officers being penalized for obeying a search warrant's command.

ARGUMENT

A. The Ninth Circuit's Creation of a New Rule of Law Requiring Officers Executing Search Warrants To Exercise Discretion To Take Fewer than All Items Described in the Warrants Has No Support in the Law and Is Unworkable in Practice

The Ninth Circuit erred in adopting a new rule that will now govern the execution of search warrants. Constructing its new rule essentially out of whole cloth, the court held that:

> [A] search warrant gives an officer the "power" to seize items specified in the warrant. While an officer generally does not have the power to seize anything not specified in the warrant, ***he retains discretion over the execution of the search*** **and, as is implicit in the word "power,"** ***can exercise discretion to leave items that may arguably come within the literal terms of the search warrant.***

App. 21 (emphasis added).

The Ninth Circuit took as its starting point the principle that "an officer has discretion over the details of

how best to proceed with a search warrant's execution." *Lawmaster*, 125 F.3d at 1349. The Ninth Circuit combined this with the generally accepted proposition that the Fourth Amendment is not violated when officers executing a warrant must exercise some minimal degree of judgment as to whether a particular item falls within the described categories in the warrant. App. 21.

But finding that the Fourth Amendment is not offended because a warrant's description of the items to be seized provides some slight leeway in determining whether an item falls outside the warrant, is a far cry from saying that an officer has discretion – even a duty – to leave behind items that are undisputedly within the scope of the warrant.

The Ninth Circuit's new rule will impose duties on executing officers that substantially exceed any duty officers may have to check for technical deficiencies in warrants. *Groh v. Ramsey*, 540 U.S. 551 (2004). This new rule will also transform the discretion over how the details of a search are to be conducted into potential broad discretion over what is to be seized – the very sort of discretion that the warrant particularity requirement is designed to prevent. *Lawmaster*, 125 F.3d at 1347-48; *Marron v. United States*, 275 U.S. 192, 196 (1927); *see also* App. 38 (Bea, J., dissenting) ("It is not the police officer's role to determine how to limit the scope of the warrant. It is the function of the independent magistrate. . . .").

The Ninth Circuit's decision does not simply confer upon officers the discretion to make decisions over how much evidence may or must be seized, it also imposes upon officers a duty to make that decision, and subjects them to the risk that they will be held liable in a civil

rights action. Based on the majority opinion, executing officers will in the future seize "all" items under a broad search warrant at their peril. Even so, those officers will not be sure that they have done enough to limit their exposure to later civil rights actions. The rule is unworkable and inconsistent with the law enunciated by this Court.

In addition to the threat of potential litigation for an unreasonable search, the Ninth Circuit has thrown a conceptual monkey wrench into the workings of the criminal justice system. By imposing on officers duties more properly left to magistrates and decisions more properly left to prosecutors, the court of appeals has virtually assured that critical evidence may never find its way to trial because it was not seized in the first instance. If the Ninth Circuit's new rule is allowed to stand, the real risk exists that – in an effort to avoid civil liability – officers will choose to leave behind evidence that is not only called for by a warrant, but which could be critical to a prosecution. That is an unacceptable risk.

The Ninth Circuit fashioned a legal rule that will require executing officers to perform the functions of both the magistrate and the prosecutor as they undertake to seize evidence described in warrants. This new rule will effectively require executing officers to review warrants and to determine in their own minds whether the warrants are overbroad. If officers believe them to be overbroad, they must use their discretion to narrow the scope of the seizure, and then execute the warrants in conformity with their own narrowed construction.

Until the majority's decision, the construction and wording of warrants were uniquely the provinces of

magistrates – neutral and independent judicial officers who have the duty to ensure that the discretion of executing officers is limited. And it was up to the prosecutor trying the case to determine which items of evidence among those seized were the most probative. But the Ninth Circuit's rule turns these relationships on their head. Under the court's decision, executing officers now have a duty to second guess magistrates' determinations of what can be seized lawfully while simultaneously anticipating what prosecutors need seized.

This is not workable in practice. As the dissent observed:

> Linderman was not the deputy district attorney who would try the case and was not in a position to judge whether the trial court would admit into evidence photographs of the objects instead of the objects themselves or whether, in this era of digitally altered images, defense counsel would ridicule a photograph as tainted by police technicians, should the original object not be produced. At the time of the search, Linderman did not know what evidence would be found, how that evidence might or might not prove Tausan was a member of the Hells Angels, nor exactly what needle the district attorney might find in that haystack. . . . It was not Linderman's role during the simultaneous search of several residences to pre-judge what would or would not turn out to be important.

App. 38, 39.

Must officers now parse the meaning of each word used in a warrant and check the dictionary for alternate meanings? What if, as here, more than one interpretation

of a particular word is available and even sensible? Are officers now duty-bound to impose their own interpretation on the terms so as to limit warrants they – but no one else – believe may be overbroad?

Will officers now decide not to seize an item, potentially duplicative of other evidence, lest they be accused of going beyond that which is "reasonably necessary?" How is an officer to know when enough evidence is enough, whether the sample seized will be admissible, or whether sufficient evidence has been seized to establish the elements that the prosecution must prove or to have an impact upon the trier of fact? These are only some of the risks posed by the Ninth Circuit's holding.

B. The Ninth Circuit's Decision Misapplied this Court's Fair Warning Standard Applicable To Qualified Immunity Determinations

1. The Ninth Circuit Relied Upon an Impermissibly Broad and General Statement of "Clearly Established" Law in Concluding that Linderman Had Fair Warning that His Conduct Was Unlawful

In addition to crafting a new – and erroneous – rule of Fourth Amendment law, the Ninth Circuit erred in denying Linderman qualified immunity. In denying Linderman qualified immunity, the Ninth Circuit found that "[a]t the time the warrants were served, a reasonable officer would have been aware that an unreasonable execution of a search warrant violated the Fourth Amendment." App. 22. Linderman submits framing the issue so broadly contravenes qualified immunity jurisprudence. This general statement of law is wholly inadequate to put Linderman

on notice that seizing all indicia evidence, instead of a sampling of evidence, violated the Constitution.

In its many decisions addressing qualified immunity, this Court has emphasized that a government official will be shielded from liability for damages for a constitutional violation if the official's actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

This Court created qualified immunity for government officers to accommodate conflicting concerns between the vindication of constitutional guarantees with the cost of permitting lawsuits against officials that can entail substantial social costs and the fear of personal liability and harassing litigation that will unduly inhibit the discharge of their duties. *Anderson*, 483 U.S. at 638.

In *Anderson,* a warrantless search case, the lower court denied an officer qualified immunity noting that: "the right of persons to be protected from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances," was clearly established. *Anderson*, 483 U.S. at 638. This Court found the lower court's general statement of the law too broad and warned that at that level of generality, "[p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* at 655.

This Court further expressed its concern that such an approach will destroy the balance that its cases have been striking between the vindication of the constitutional

rights of citizens and public officials' effective performance of their duties. *Anderson,* 483 U.S. at 639.

This Court has also held that established law must provide officials with "fair warning" that conduct is unlawful; although there is no requirement that case law exist with essentially the same fact pattern as that confronting officials before the officials will lose the protection of qualified immunity. *Hope*, 536 U.S. at 740-741, discussing *United States v. Lanier*, 520 U.S. 259 (1997). But if "a general constitutional rule already identified in the decisional law [applies] with *obvious clarity* to the specific conduct in question," qualified immunity will not attach. *Lanier*, 520 U.S. at 271 (emphasis added).

When this Court enunciated the "fair warning" standard in *Hope* and *Lanier*, it was not undoing the principles of qualified immunity articulated in *Harlow* and refined thereafter. To the contrary, in *Lanier*, this Court emphasized that the "fair warning" standard was essentially indistinguishable from the rule articulated in *Anderson*. *Lanier*, 520 U.S. at 270-271.

Indeed, just last term this Court summarily reversed the Ninth Circuit "to correct a clear misapprehension" of the qualified immunity standard in *Brosseau v. Haugen*, 125 S.Ct. 596, 598, fn. 3 (2004). This Court found that the plaintiffs' excessive force claim was far from the obvious one where general statements of the law alone offer a basis for decisions. *Id.* at 590. And that the Ninth Circuit had cast the general state of the law at a high level of generality. *Id.* at 585. In so doing, this Court wrote that the Ninth Circuit "was mistaken." *Id.* at 590.

After *Brosseau*, it ought to have been clear that the "fair warning" standard announced in *Hope* was not

intended to work any profound change in qualified immunity law. Nevertheless, as the decision below so starkly demonstrates, the Ninth Circuit has continued to misapprehend the law and to apply "clearly established" law at too high a level of abstraction.

General statements of law are likely to be especially incapable of providing fair warning in the thorny context of the Fourth Amendment, where the reasonableness of a search or seizure must be determined from all the circumstances. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979); *cf. Brosseau*, 125 S.Ct. at 599. Like the claim of excessive force in *Brosseau*, the present case is "far from the obvious one" in which a general statement of law posed by the Ninth Circuit would have given Linderman fair warning.

If the decision below is allowed to stand, there will likely be considerable confusion in at least the Ninth Circuit over the very question that first *Anderson*, and then *Brosseau*, sought to answer: at what level of generality should clearly established law be applied in the qualified immunity analysis? And, if the Ninth Circuit's approach to qualified immunity is adopted more widely, it would threaten to eviscerate the standards this Court has repeatedly articulated since *Anderson*. Officials will lose the ability to anticipate when their conduct may give rise to liability since violation of abstract legal rights alone will be a sufficient basis upon which to deny qualified immunity.

2. Under an Appropriately Particularized Analysis, It Would Not Have Been Obvious To a Reasonably Well-Trained Officer that the Searches in this Case Were Unlawful

a. No prior authority has held that searches require officers to use discretion to seize only a sample, or less than all of the items, described in an otherwise constitutional warrant

As noted above, it bears emphasizing that in holding that officers have, and must exercise, discretion to seize only a "sampling" of items described in a warrant, ***the Ninth Circuit announced a new rule***. By definition, a new legal rule could not have been clearly established at the time of these searches and officials cannot be charged with knowledge of such a rule. *Harlow*, 457 U.S. at 818. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.")

No case that Petitioner has been able to locate has held, or even suggested, that the discretion an executing officer has "over the details of how best to proceed with a search warrant's execution" (*Lawmaster*, 125 F.3d at 1349), actually gives the officer discretion to decline to seize items described in the warrant. Quite to the contrary, all of the existing authority pointed in the other direction.

Settled law at the time of these searches provided that "as to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron*, 275 U.S. at 196; *Lawmaster*, 125 F.3d at 1348-1349. *See also Davis v. Gracey*, 111 F.3d 1472, 1478 (10th Cir. 1997). ("As an

irreducible minimum, a proper warrant must allow the executing officers to distinguish between items that may and may not be seized.")

Under settled case law, the purpose of a warrant is to ensure that officers do not seize something outside the scope of the warrant. No case or other authority has suggested that officers had the discretion, or furthermore are required, not to seize items clearly within the scope of the warrant. Indeed, even *Apker*, one of the cases upon which the Ninth Circuit relied, warned that it was not adopting a rule that would permit or require executing officers to be the final arbiters of what to seize. *Apker*, 705 F.2d at 302-03. Although the *Apker* court found that the indicia warrants in that case lacked sufficient particularity – an issue not presented here – the court stressed that:

> We are not asking law enforcement officials to assess exactly how much evidence is needed for a conviction. . . . And even when indicia are being sought just to prove membership, we would permit the accumulation of evidence when the items were specifically identified because the specific identification would help prevent a free-wheeling search into a person's possessions.

705 F.2d at 302-03. Thus, *Apker* holds that where – as here – a warrant is sufficiently particularized, the accumulation of evidence is constitutional.

The Ninth Circuit majority also remarked in a footnote that an "officer does retain discretion as to how to reasonably execute a search warrant," citing *Strauss v. Stynchcombe*, 165 S.E.2d 302, 307 (Ga. 1968). App. 21. Citation to this 1968 Georgia Supreme Court decision further evidences the court's strained qualified immunity

analysis. It is unrealistic to expect a single case from Georgia to provide California officers with fair warning that their conduct is unlawful.

Moreover, *Strauss* only holds that a warrant, which authorizes an officer to make a factual determination about whether a specific document is within the scope of a warrant, is constitutional. *Strauss*, 165 S.E.2d at 307. In fact, the *Strauss* court distinguished this type of warrant from an unlawful warrant allowing the seizing officer to "use his own judgment." *Id.* Thus, *Strauss* actually supports the proposition that officers do not have discretion about what to seize; they may only determine whether a specific item is called for by the warrant.

The circumstances of this case would not have suggested that Linderman had any discretion to leave behind items called for in the warrants. After all, a magistrate had issued the warrants that "commanded" the officers to seize the described materials. App. 31. Nor should the use of the word "any" in the warrants have signaled to Linderman that he was allowed or required to take fewer than all items of evidence. As the dissent emphasized, other equally valid definitions existed that construed "any" to mean "all." App. 33. That alone should have disposed of the qualified immunity question.

Nothing in the law or the facts would have given Linderman fair warning that he was required to ignore the warrants' command or to treat that command as advisory only. No reasonable officer in Linderman's position would have thought that he had discretion to pick and choose what items should be seized and what items should be left behind.

b. The law regarding whether an officer can make an otherwise particular indicia warrant unlawfully broad by executing it literally, was not clearly established

To the extent that the Ninth Circuit implied that the warrants were not particular enough, the lower court's earlier finding that there was probable cause to search for indicia was not before the Ninth Circuit. Even if this question were before the court, the Ninth Circuit's analysis faults the execution, not the warrants, by finding that too many items responsive to the warrants were seized. This turns the particularity requirement on its head.

In 1998, the law established that a search warrant must "describe the things to be seized with a sufficient degree of particularity such that nothing is left to the officer's discretion as to what is to be seized and such that the executing officer is prevented from generally rummaging through a person's belongings." *Lawmaster*, 125 F.3d at 1347-48; *see also Marron*, 275 U.S. at 196.

If the terms of a warrant leave the determination of what is to be taken solely, or even largely, to the discretion of an officer, the warrant will violate the particularity requirement.[2] *United States v. Cochran*, 806 F.Supp. 560, 565 (E.D.Pa. 1992) (warrant that left to officers the determination of what constituted "pornography" subject to seizure violated particularity requirement).

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[2] This supports the position that officers do not have discretion about what to take.

The particularity requirement is not violated by a search warrant seeking a broad category of material;[3] even one that uses catchall phrases like "all."[4] Likewise, the warrant may utilize generic language: "[i]n many cases officers are unable to specify in advance all seizable evidence on the premises to be searched." *United States v. Hillyard*, 677 F.2d 1336, 1339-40 (9th Cir. 1982). The district court here correctly found that the warrants were facially valid, i.e., sufficiently particular, in upholding them against a probable cause attack. App. 46. That issue is resolved.

To the extent that the Ninth Circuit alternatively appeared to hold Linderman accountable by suggesting that an officer can make an otherwise particular warrant broad during the execution by executing it literally, the lower court relies on *Apker*. App. 18. As noted above, however, *Apker* involved a very different question.[5] *Apker* did not hold that officers have a duty to take a representative sample. Rather, *Apker* held that certain items specified in the warrant were overbroad.

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[3] The particularity requirement is not violated by a search warrant seeking very broad categories of materials where the wrongdoing alleged is itself wide-ranging. *United States v. Paccione*, 738 F. Supp. 691, 709 (S.D.N.Y. 1990).

[4] *See United States v. Conley*, 4 F.3d 1200, 1208 (3d Cir. 1993) (use of the word "all" did not necessarily transform a warrant into an impermissible general warrant); *see also United States v. Offices Known As 50 State Distributing Co.*, 708 F.2d 1371, 1374 (9th Cir. 1983) and *Andresen v. Maryland*, 427 U.S. 463, 479-82 (1976) (A search warrant may contain a catchall phrase as long as it sufficiently limits the discretion of the officers in executing the warrant.)

[5] Notably, *Apker* also involved a First Amendment challenge to the seizure not applicable here.

Significantly, the Ninth Circuit in *United States v. Rubio*, 727 F.2d 786 (9th Cir. 1984), did not reach the issue of whether indicia warrants identical to those in *Apker* were sufficiently particularized. Instead, the *Rubio* court stated that, "We recognize the potential for abuse that these indicia warrants can present. . . . [W]e conclude only that a narrowly drawn, and properly issued and executed warrant which authorizes the search for indicia of membership or association with a particular enterprise, does not violate the [] suspect's right to freedom of association." *Id.* at 792 (emphasis added).

Based on the law in 1998, therefore, a reasonably well-trained officer *would have known* that: (1) a warrant can seek broad categories of documents or materials, including a catchall phrase like "all"; (2) indicia warrants are required to be "narrowly drawn"; (3) and indicia warrants that call for specific objects – even objects described in categorical terms (e.g., photographs) – satisfy particularity standards. A reasonably well-trained officer would also have known that a warrant was sufficiently particular if it indicated what the officer could and could not seize and did not leave those decisions to the officer's discretion. On the other hand, a reasonable officer would not have known that he or she violated the law by executing the terms of a sufficiently particular indicia warrant literally.

Consequently, the foregoing principles would not have clearly established that Linderman violated the law when he gave instructions regarding the execution of the indicia warrants. These warrants sought specific categories of items that contained certain specified logos or phrases. It is undisputed that everything the officers seized were

specific objects that did, in fact, fall within the indicia categories described in the warrants. App. 37.

c. The law was not clearly established that the destruction of property that was reasonably necessary to execute a valid warrant renders a search unreasonable

The law was established at the time of the searches in this case that "an officer's conduct in executing a search is subject to the Fourth Amendment's mandate of reasonableness from the moment of the officer's entry until the moment of departure. [Citation omitted.]" *Lawmaster*, 125 F.3d at 1349, citing *inter alia Dalia v. United States*, 441 U.S. at 238, 257 (1979). As long as officers' conduct remains within the boundaries of reasonableness, officers have discretion over the details of how best to proceed with the execution of search warrants. *Id.* "[O]fficers may only engage in conduct that reasonably furthers the purpose for which they are in the home; those officers who execute a warrant in an unreasonable manner violate the Constitution." *Lawmaster*, 125 F.3d at 1351.

The law equally established that some damage to property, if reasonably necessary to effectuate a warrant's purpose, is permissible. *Dalia*, 441 U.S. at 258; *Liston*, 120 F.3d at 979; *Tarpley v. Green*, 684 F.2d 1, 9 (D.C. Cir. 1982). Both *Liston* and *Lawmaster*, relied upon by the majority to find that the searches were unlawfully executed, are – as the dissent recognized – easily distinguishable. App. 22, 35.

Lawmaster held that, in a search for illegal weapons, it was reasonable for the officers to break the lock on a gun vault to examine its contents. *Lawmaster*, 125 F.3d at

1346. But it was unreasonable for the officers to leave a gun in a bowl of water and to spread cigarette ashes over the bedding since the latter acts had nothing to do with the actual search itself. *Id.*

In *Liston*, the officers searched the correct premises, but those premises were no longer occupied by the targets of the search. *Liston*, 120 F.3d at 970-71. The officers did not learn the truth until partway through the search. The officers had ransacked the premises, dumped garbage, emptied closets and drawers, destroyed the backyard fence, and dug up the backyard. *Id.* at 979. The court stated that this conduct might have been *lawful* if the property destruction occurred before the officers had learned the truth about the identity of the occupants. The court remanded to the district court for a determination of that issue. *Id.*

Of particular relevance to the qualified immunity determination in this case is *United States v. Becker*, 929 F.2d 442 (9th Cir. 1991), a decision that the court did ***not*** discuss. In *Becker*, the Ninth Circuit held that it was not unreasonable for officers, executing a broad search warrant at the defendant's residence for evidence of drug manufacturing, to use a jackhammer to remove a newly-poured concrete slab from an outbuilding concealing methamphetamine. The defendant claimed that the officers should have obtained a separate warrant to undertake the destruction of the concrete slab. The Ninth Circuit disagreed because the officers "already had a warrant to search the premises for precisely the type of evidence found under the slab." *Id.* at 446. *See also United States v. Andreu*, 715 F.2d 1497 (11th Cir. 1983) (where officers had probable cause to search a boat for marijuana, it was reasonable to use a power saw to remove a portion

of the deck after other efforts to search below the deck had failed.)

Linderman undoubtedly oversaw searches resulting in the seizure of a large amount of material called for by the warrants. But there is no allegation that the officers seized items outside the warrants' scope. Nor was there any allegation that the officers destroyed property or engaged in destructive activity unrelated to the items seized. Any property damage occurred to "precisely the type of evidence" described in the warrants.

Particularly in light of prior Ninth Circuit authority, such as *Becker* and *Liston*, it cannot be said that a reasonably well-trained officer would have known that it was unreasonable to remove items called for in the warrants that displayed gang "indicia," even if it meant jackhammering a sidewalk, taking motorcycles, and removing a refrigerator door. App. 39. (As the dissent noted, "I fail to see how a torn-up sidewalk, spoiled food in the refrigerator, and the loss of the mailbox rise to the level of a constitutional violation.")

d. Summary

A reasonably well-trained officer would have had no reason to believe that these searches were unreasonable. The Ninth Circuit adopted an overly broad formulation of the "clearly established law" and applied a new rule that could not have been clearly established at the time of the searches. It also failed to recognize that the law, in the appropriately particularized sense required by this Court's directives, was not clearly established at the time Linderman acted. Under these circumstances, the Ninth Circuit's decision should be reversed. To the extent that the Ninth

Circuit's application of the fair warning standard suggests that it continues to misapprehend this Court's decision in *Hope*, it would be appropriate for this Court to accept review and emphasize, once again, how courts are to apply qualified immunity law.

CONCLUSION

This Court should accept review and then reverse.

Respectfully submitted,

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July 1, 2005

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE SAN JOSE CHARTER OF THE HELLS ANGELS MOTORCYCLE CLUB, an unincorporated association; JAMES ARNETT; MARNIE ARNETT; ROBERT BRANCATO; LESLIE BRANCATO; RONALD COOK; VICKI BOZZI; FILLMORE CROSS; MARGARET CROSS; TED DEMELLO; DEBORAH VAN TASSEL; JAMES ELRITE; MOLLY ELRITE; LARRY GORHAM; JEFFREY PETTIGREW; JAMES SOUZA; ROBERT VIEIRA; LORI VIEIRA; JAMES WELCH; GREGORY WILKINS; DENISE WILKINS,

Plaintiffs-Appellees,

v.

CITY OF SAN JOSE, a municipal corporation,

Defendant,

and

DECENA, Sgt.; CARNEY, Sgt.; MESSIER, Officer; NIEVES, Officer; MICHAEL FERNANDEZ, Police Officer, San Jose Police Officer; WILLIAM MANION, Police Officer, San Jose Police Officer; D. NEWMAN, Police Officer; San Jose Police Officer; KNOX, Police Officer, San Jose Police Officer,

Defendants-Appellants.

No. 02-16329

D.C. No.
CV-99-20022-JF

THE SAN JOSE CHARTER OF THE HELLS ANGELS MOTORCYCLE CLUB, an unincorporated association; JAMES ARNETT; MARNIE ARNETT; ROBERT BRANCATO; LESLIE BRANCATO; RONALD COOK; VICKI BOZZI; FILLMORE CROSS; MARGARET CROSS; TED DEMELLO; DEBORAH VAN TASSEL; JAMES ELRITE; MOLLY ELRITE; LARRY GORHAM; JEFFREY PETTIGREW; JAMES SOUZA; ROBERT VIEIRA; LORI VIEIRA; JAMES WELCH; GREGORY WILKINS; DENISE WILKINS,

Plaintiffs-Appellees,

v.

CITY OF SAN JOSE, a municipal corporation; DECENA, Sgt.; CARNEY, Sgt.; MESSIER, Officer; NIEVES, Officer; MICHAEL FERNANDEZ, Police Officer, San Jose Police Officer; WILLIAM MANION, Police Officer, San Jose Police Officer; D. NEWMAN, Police Officer; San Jose Police Officer; KNOX, Police Officer, San Jose Police Officer; JORGE GIL-BLANCO, Officer; CHARLES GILLINGHAM, Sheriff; MARK TRACY, Sheriff; City of Capitola; DONALD BRAUNTON; M. LAPLANT, FBI Agent; KEITH LITTLE, Officer; SAN JOSE POLICE DEPT. NET ENTRY TEAM; SAN JOSE POLICE DEPT. M.E.R.G.E. UNIT #2; JAMES GREER; RONALD LEBAUDOUR; SANTA CLARA POLICE OFFICERS; COFFMAN, OFFICER; GILROY POLICE DEPT.,

Defendants,

No. 02-17132

D.C. No. CV-99-20022-JF

OPINION

and

ROBERT LINDERMAN, Deputy Sheriff, in his individual capacity,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of California Jeremy Fogel, District Judge, Presiding

Argued and Submitted
December 3, 2003 – San Francisco, California

Filed April 4, 2005

Before: Richard A. Paez, Marsha S. Berzon, and Carlos T. Bea, Circuit Judges.

Opinion by Judge Paez;
Partial Concurrence and Partial Dissent by Judge Bea

COUNSEL

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Richard Doyle, City Attorney, Michael G. Groves, Senior Deputy City Attorney, Clifford Greenberg, Senior Deputy City Attorney, Office of the City Attorney, San Jose, California, for defendants-appellants Decena, Newman, Manion, Knox, Carney, Messier, and Nieves.

Karen L. Snell, Kate Dyer, and Marc H. Axelbaum, Clarence, Snell & Dyer, LLP, San Francisco, California, for the plaintiffs-appellees.

OPINION

PAEZ, Circuit Judge.

In this civil rights action under 42 U.S.C. § 1983, Defendants-Appellants, seven San Jose City Police Officers ("SJPOs")[1] and Deputy Sheriff Linderman, appeal from an order of the district court denying in part their motions for qualified immunity. This action arises out of the simultaneous execution of search warrants at the residences of members of the Hells Angels, and at the Hells Angels clubhouse on January 21, 1998. While executing one of the search warrants at the residence of plaintiffs Lori and Robert Vieira, the officers shot two of the Vieiras' dogs. While searching plaintiff James Souza's property, the officers shot and killed one of Souza's dogs. During the course of the searches at all of the locations, the officers seized literally "truckloads" of personal property for the sole purpose of showing in a murder prosecution that the Hells Angels had common symbols, which in turn would qualify it as a criminal street gang and therefore support a sentencing enhancement under California Penal Code § 186.22 against the defendant in that case. In seizing this "indicia" evidence, the officers seized numerous expensive Harley-Davidson motorcycles, a concrete slab, and a refrigerator door and in so doing, caused significant damage to the items seized as well as to other property.

In their third amended complaint, the plaintiffs alleged that the searches violated the Fourth Amendment.

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[1] The SJPOs are defendants Sergeant Decena, Sergeant Carney, Officer Messier, Officer Nieves, Officer Manion, Officer Newman, and Officer Knox.

The defendants moved for summary judgment on the ground that they are entitled to qualified immunity. The district court, applying the two-part test established by the Supreme Court in *Saucier v. Katz*, 533 U.S. 194 (2001), for determining whether a public official is entitled to qualified immunity, denied their motions, in part. The SJPOs and Linderman appeal the denial of their motions for qualified immunity.

We affirm the district court's order denying the SJPOs and Linderman qualified immunity. We hold that Linderman's instruction to seize "truckloads" of personal property, including numerous motorcycles and a piece of concrete, for the sole purpose of proving that the Hells Angels was a gang was an unreasonable execution of the search warrants in violation of the Fourth Amendment. We further hold that at the time the searches were carried out the law was sufficiently clear to put a reasonable officer on fair notice that this conduct was unlawful.

We also hold that the shooting of the dogs at the Vieira and Souza residences was an unreasonable seizure, and an unreasonable execution of the search warrants, in violation of the Fourth Amendment. Exigent circumstances did not exist at either residence, as the SJPOs had a week to consider the options and tactics available for an encounter with the dogs. Nonetheless, the officers failed to develop a realistic plan for incapacitating the dogs other than shooting them. Finally, we hold that the unlawfulness of the officers' conduct would have been apparent to a reasonable officer at the time the officers planned for serving the search warrants.

I.

A. Statement of Facts

A. Events Leading to the January 21, 1998 Search

On August 24, 1997, Kevin Sullivan was beaten to death at the Pink Poodle nightclub in San Jose. Linderman of the Santa Clara County Sheriff's Office led the murder investigation. He ultimately determined that Steve Tausan, one of the nightclub's bouncers and a member of the San Jose Charter of the Hells Angels Motorcycle Club ("SJHA"), committed the crime.[2] Linderman also suspected other SJHA members and associates of concealing evidence of the murder.[3]

The District Attorney's Office charged Tausan with the murder of Kevin Sullivan. On October 6, 1997, Linderman applied for a warrant to search the SJHA clubhouse and the residences of various individuals alleged to be affiliated with the Hells Angels. On the basis of Linderman's 27-page affidavit and the testimony of confidential informants, Santa Clara County Superior Court Judge John Ball issued the search warrants on the same day, authorizing a search of the clubhouse and the individual residences for a security videotape depicting the beating of

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[2] According to the security guard at the Pink Poodle, Kevin Sullivan was harassing a dancer at the nightclub and had been told that the Pink Poodle employed Hells Angels members as bodyguards. Sullivan responded with derogatory remarks about the Hells Angels. The owner of the nightclub called Tausan and told him what happened. Tausan allegedly arrived ten minutes later and beat and killed Sullivan.

[3] A witness told Linderman that there was a videotape of the incident made over the Pink Poodle security system. The witness stated that he believed that a copy of the tape had been given to the Hells Angels.

Sullivan, financial records connecting the Hells Angels to the Pink Poodle, and notes of a Hells Angels meeting held five nights after the killing. Police investigative officers recovered meeting minutes after several exhaustive searches, but failed to find the alleged videotape.[4]

In January 1998, the District Attorney's Office sought a second set of search warrants for nine residences and the SJHA clubhouse. In support of the application for the second set of warrants, Linderman submitted a 24-page affidavit, which incorporated his October 6, 1997 affidavit. Judge Ball issued the warrants as requested on January 20, 1998. The ten warrants were substantially identical except for the location and the name of the resident. The second set of warrants again authorized the seizure of a copy of the security videotape, and notes or records of a Hells Angels meeting held on the Friday following the murder of Sullivan.[5] Judge Ball also authorized a search for evidence that showed indicia of Hells Angels affiliation, including "any evidence of membership in, affiliation with, activity of, or identity of, any gang, including but not limited to, any reference to 'Hells Angels.'" The purpose of this provision in the warrants was to obtain evidence supporting a street gang sentencing enhancement against Tausan under California Penal Code § 186.22 because,

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[4] The October 7, 1997 search is not a subject of this appeal.

[5] In a ruling not at issue in this appeal, the district court ruled that the affidavit supporting the search warrant was insufficient to establish probable cause to search for the videotape or meeting notes. The court, however, found that the warrant was supported by probable cause for the purpose of seeking gang indicia evidence. The plaintiffs do not challenge the probable cause determination in this interlocutory appeal.

allegedly, the murder had been committed in furtherance of the criminal conduct of the Hells Angels "gang."

Prior to the January 1998 searches, the Sheriff's Office had arranged for assistance from multiple law enforcement agencies, including the San Jose City Police Department. There were two types of law-enforcement teams that assisted with the execution of the warrants. First, "entry teams" composed of San Jose City police officers were used to enter the premises surrounding the residences and secure safe entry into the residences. Once the location was secured, "search teams" composed only of officers from the Sheriff's Office were to conduct the searches and take possession of property covered by the warrant. Leaders of the entry teams were given approximately one-week advance notice of the action in order to prepare for the searches.

At 7:00 a.m. on the morning of January 21, 1998, teams of law enforcement officers simultaneously served the search warrants at residences of members of the Hells Angels in various parts of Santa Clara and Santa Cruz counties. It is the conduct of the law enforcement personnel in carrying out these searches under the second set of warrants that gave rise to plaintiffs' claims.[6]

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[6] The district court held that the search of Jeffrey Pettigrew's residence did not violate a clearly established constitutional right, and therefore, the defendants were entitled to qualified immunity with respect to that search. The plaintiffs have not challenged that ruling on appeal.

B. San Jose Police Officers

The role of the SJPOs was to effect entry and secure the premises at the various locations for the search teams. The Vieiras and Souza both had large, aggressive dogs. The SJPOs shot and killed dogs at both residences.

1) Souza Residence

The entry operation at the Souza home was supervised by Sergeant Decena, who learned about the search a week prior to the operation. Officer Newman supervised the search of Souza's residence. He obtained Souza's arrest record, which revealed that Souza had been arrested for weapons and narcotics charges. The team also received background information which showed that there were two guard dogs, one which was a Rottweiler, at the Souza residence. During surveillance before the search, the SJPOs saw a sign on Souza's side gate stating "Warning Property Protected By Guard Dog;" the officers also learned that Souza owned a Rottweiler that was known to attack without provocation.

The officers planned to gain entry into Souza's house by having a primary team go through the front door, while a secondary team entered through a side gate to secure the backyard and to allow for the safe search of a second smaller building. The plan was for the officers to make both entries simultaneously and to announce their presence with a knock notice at the front door.

The SJPOs planned either to isolate or to shoot the dogs, so they would not threaten the safety of the primary entry team. The officers had no plan to use non-lethal methods of incapacitation; nor did they have a specific

plan for "isolating" the dogs or any intention of giving Souza the opportunity to isolate his Rottweiler himself.

On the day of the search, the primary entry team entered through the front door of the main house[7] while the secondary team unsuccessfully tried to cut the lock on the side gate with bolt cutters. The secondary team's failure to gain entry through the gate caused them to enter the main house following the first team, at which point the secondary team informed the first team that they had failed to gain access to the backyard through the side gate. Although both teams were safely inside the house, the backyard remained unsecured and the dogs remained on the loose. We note, however, that because Souza was not home the teams could have conducted their search inside the house without hurriedly dealing with the dogs in the backyard.

Nonetheless, after entering the backyard through the main house, two of the officers proceeded to patrol the yard to look for the Rottweiler. Because miscellaneous objects and machinery strewn across the yard created obstacles to both motion and sight, the officers kept their firearms (MP-5 automatic rifles) drawn. Then, according to Officer Manion,

> [t]he [R]ottweiler suddenly appeared around the corner, approaching from the west at a distance of about ten to fifteen feet. It looked at me, gave a low growl, and started advancing toward me. I feared that the dog was going to attack me and I

[7] Souza was not home, so the entry team members broke down the front door after receiving no answer to their knock.

> immediately discharged my firearm pulling the trigger twice.

Officer Manion's shots killed the Rottweiler instantly. The SJPOs left unharmed a small white dog that was also present but was judged to pose no threat once the Rottweiler had been killed.

2) Vieira Residence

Sergeant Carney supervised the search operation for the Vieira residence and was given about a week to plan the search. Like Souza, the Vieiras had not been accused of any crime. Officer Messier, the team leader, conducted surveillance and gathered intelligence several days prior to the operation which revealed that: (1) Robert Vieira had prior weapons-related convictions; (2) the Vieira property included a residence and a junkyard completely encircled by a tall, padlocked, cyclone fence, and (3) there might be dogs, although the number and breed were unknown. Messier assigned Officer Nieves the task of handling any dogs that might be present. The plan for entering the property was to cut the lock on the outer fence, approach the house, give knock-notice, then enter and secure the house.

At the Santa Clara Sheriff's Office briefing on the morning of the operation, Sergeant Carney was told that the Vieira property, in particular, was guarded by three large dogs. Officer Nieves, who was assigned the duty of protecting the entry team, planned to deal with the dogs in the following manner: First, he hoped that the dogs would not appear at the gate. If they did, he planned to poke them through the fence with his shotgun and try to scare them. (Officer Nieves carried a shotgun specifically

because of the possible presence of dogs.) If that did not work, he planned to assess the situation and engage the dogs, to ensure the safety of the entry team. Because the SJPOs believed that they needed to secure quick entry to preserve an element of surprise and prevent the possible destruction of evidence, they had no intention of calling on the Vieiras to control their dogs.

When the entry team approached the Vieiras' gate, three large dogs resembling Bullmastiffs emerged and ran toward the gate barking and growling. As the officers stuck their hands through the fence to cut the lock, one of the dogs jumped and snapped at their hands. Although the SJPOs were armed with pepper spray, no officer attempted to use the spray to subdue the dogs.[8] Instead, Officer Nieves attempted to scare the dogs away by yelling at them and pushing one of the dogs back with the barrel of his shotgun. The dogs, however, would not retreat, and the persistent barking caused Officer Nieves to fear that the surprise of the mission might be compromised.

Officer Nieves pointed his shotgun at one of the barking dogs and shot it. The first dog went down, but the second dog did not retreat. Officer Nieves shot at the second dog twice, critically wounding it, causing it and the third dog to retreat.[9] Although he had already shot the first dog at point blank range, Officer Nieves testified that the dog "was apparently trying to get back up . . . [a]nd in an effort to ensure that he wasn't going to attack or be a

[8] The officers did not bring with them any of the variety of non-lethal "pain compliance" weapons used by police forces, such as tasers or stunbag shotguns.

[9] The second dog was later taken by an Animal Control Officer and euthanized due to extensive injury.

problem for the team," Officer Nieves fired a fourth shot at the dog's head, killing it. The SJPOs left unharmed the third dog, which retreated to a hiding place away from the officers, and the fourth dog, which was chained in the backyard.

Meanwhile, the noise outside awoke Robert Vieira. He emerged from the house at the second floor balcony just as the officers gained entry through the gate. The police instructed him to remain where he was with his hands up. An officer broke through the front door using a ram. When the SJPOs reached Robert Vieira, they located a firearm propped up against the bedroom window.

C. *Linderman's Seizure of "All" Indicia of Membership In the Hells Angels*

The January search warrants included a provision for the seizure of property with indicia of Hells Angels affiliation, to assist the prosecution in obtaining evidence to support a gang sentencing enhancement against Tausan under Penal Code § 186.22. To this end, the search warrants authorized seizure of:

> Any evidence of membership in affiliation with, activity of, or identity of, any gang, including but not limited to, any reference to "Hells Angels," "HA", "Red & White", "81", "Big Red Machine", "HAMC", including, but not limited to, "West Coast OM notes", "East Coast OM notes", "BHC newsletter", including, but not limited to, drawings, paintings, photographs, photograph albums, videotapes, writings, furniture, furnishings, fixtures, and objects known, or which may appear by content, to depict or contain mention of membership in, affiliation with, activity of, or identity of,

> any gang, including, but not limited to, the following: names, initials, and monikers of known, or which may appear by content, to be gang members or affiliates; acronyms, logos, slogans, symbols, signs, and expressions known, or which may appear by content, to identify a gang or any of its members or affiliates; and identifying numbers, colors, and expressions of a geographic region with which a gang is known, or which may appear by content, to associate. . . .

On the day of the January 1998 search, separate search teams from the Santa Clara Sheriff's Office conducted the searches and seizures once the various premises were secured. Although Linderman did not personally participate in the execution of all of the warrants, he coordinated the efforts of the law enforcement agencies, made the initial risk assessment with respect to each location, and answered questions called in by officers at the search sites.

The search teams at the Hells Angels' residences found that there were numerous items that bore indicia of Hells Angels affiliation. Fearing that they might take too many items, several officers called Linderman to clarify what items should be seized. Linderman instructed them to take everything that constituted "indicia" of Hells Angels affiliation as defined in the warrant, including belts, jewelry, plaques, t-shirts, hats, watches, vests, calendars, clocks, sculptures, photographs, and correspondence. The officers conducting the searches also took larger articles such as motorcycles, a mailbox, a refrigerator door with decals, and a cement portion of the driveway in front of the clubhouse containing the signatures of Hells Angels members. At the end of the searches, the teams carted away "literally truckloads of Hells Angels indicia"

and had to rent special offsite storage to accommodate the large amount of evidence.

II.

STANDARD OF REVIEW

We review *de novo* a district court's decision regarding qualified immunity. *Elder v. Holoway*, 510 U.S. 510, 516 (1994). The evidence must be viewed in the light most favorable to the non-movant. *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir.2002). "To the extent that the defendants' arguments quibble with the district court's view of the facts, we do not consider them. We view the evidence in the light most favorable to the plaintiffs." *Ganwich v. Knapp*, 319 F.3d 1115, 1119 n.5 (9th Cir.2003).

Qualified immunity serves to shield government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court has set forth a two-pronged inquiry to resolve all qualified immunity claims. First, "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officers' conduct violated a constitutional right?" *Saucier*, 533 U.S. at 201. Second, if so, was that right clearly established? *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. This inquiry is wholly objective and is undertaken in light of the specific factual circumstances of the case. *Id.* at 201; *see also Sorrels v. McKee*, 290 F.3d 965, 970 (9th Cir.2002).

III.

DISCUSSION

A. *Search for All Indicia of Hells Angels Affiliation*

We affirm the district court's denial of qualified immunity to Deputy Sheriff Linderman.

The plaintiffs allege that Linderman's instruction to seize every item with indicia of Hells Angels affiliation, including customized Harley-Davidson motorcycles and a refrigerator door, was an unreasonable execution of the search warrants in violation of their Fourth Amendment rights. They further argue that the manner in which the warrants were executed under Linderman's instructions was unreasonable because the officers caused unnecessary destruction of property, including jack-hammering the sidewalk in front of the Hells Angels clubhouse to remove a piece of concrete with the Hells Angels' names. The plaintiffs argue this conduct violated their Fourth Amendment right to be free of "unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively." *Liston v. County of Riverside*, 120 F.3d 965, 979 (9th Cir. 1997).

The test of what is necessary to "execute a warrant effectively" is reasonableness. "An officer's conduct in executing a search is subject to the Fourth Amendment's mandate of reasonableness from the moment of the officer's entry until the moment of departure." *Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997). "When officers obtain a warrant to search an individual's home, they also receive certain limited rights to occupy and control the property; however, the Fourth Amendment binds the officers such that the right to search a home concomitantly

obliges the officers to do so in a reasonable manner." *Id.* at 1350.

In examining whether Linderman caused the officers to execute the warrants unreasonably, "it is proper to consider both the purpose disclosed in the application for a warrant's issuance and the manner of its execution." *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978). This is because "[t]he standard of reasonableness embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion." *Berger v. New York*, 388 U.S. 41, 70 (1967) (Stewart, J., concurring). Here, the January 1998 search warrants authorized a search of the Hells Angels' residences for (1) a videotape of scenes from the Pink Poodle on August 24, 1997; (2) indicia of Hells Angels affiliation or membership; and (3) notes or records of meetings at the Hells Angels clubhouse. Although the officers did not find the videotape or meeting notes, the officers seized numerous items of Hells Angels indicia. It is the manner in which the officers carried out this latter objective that, in part, led to the plaintiffs' civil rights action. Viewing the facts in the light most favorable to the plaintiffs, we conclude that the authority to seize indicia evidence to support a sentencing enhancement against Tausan did not justify the level of intrusion and excessive property damage that occurred during the search of the various locations.

The search for indicia of Hells Angels affiliation served a limited purpose. The property here in dispute was not evidence of a crime; rather, the justification for seizing the indicia evidence was to support a sentencing enhancement against Tausan. As Linderman explained at his deposition, the indicia evidence was "evidence towards the gang enhancement. That's what it was being seized

for." In the Tausan murder trial, the prosecution sought to prove the applicability of a three-year sentencing enhancement by showing that Tausan was a member of an "ongoing organization, association, or group of three or more persons . . . having a common sign or symbol." Cal. Penal Code § 186.22. The prosecution sought this evidence from the plaintiffs, who were neither codefendants with Tausan in the murder trial nor charged with any crime. To prove the sentencing enhancement, the officers seized "literally truckloads" of evidence. The officers seized belts, jewelry, plaques, t-shirts, hats, watches, vests, calendars, clocks, sculptures, photographs, and correspondence. They seized the plaintiffs' Harley-Davidson motorcycles, most worth over $20,000, because they contained indicia of Hells Angels affiliation. The officers jack-hammered and removed a piece of the sidewalk in front of the Hells Angels clubhouse because some of the members' names were written on it. The officers also removed the door to the (working) clubhouse refrigerator because it had a Hells Angels decal on it. The clubhouse mailbox and clubhouse street sign that read "Angels Place" were also seized.

As the Eighth Circuit noted in reviewing a similar warrant for indicia evidence (also served on the Hells Angels), such evidence diminishes in evidentiary value the more evidence is seized:

> The indicia warrants, like many warrants, authorized the search of nearly every corner of the residence. Unlike most warrants, these warrants were issued to obtain evidence on just one fact – membership in the Hells Angels. Unlike most warrants, the evidence on this issue would be needlessly cumulative once enough evidence was obtained to establish membership. While additional evidence would usually show the breadth

> of criminal activity, in the instant case additional evidence would at some point have no additional probative value in determining membership.

United States v. Apker, 705 F.2d 293, 302 (8th Cir.), *modified on other grounds, United States v. Fitzgerald*, 724 F.2d 633 (8th Cir. 1983) (en banc). Despite the "truckloads" of evidence seized during the searches, the prosecution only presented a few seized photographs at Tausan's trial. The motorcycles, concrete slab, and refrigerator door were not offered to support the gang enhancement at Tausan's trial.

Although the seizure of the indicia evidence was for the limited purpose of establishing a sentencing enhancement against Tausan, Linderman nonetheless instructed every officer who called him to seize anything with Hells Angels indicia.[10] In so doing Linderman asserts that he was simply complying with the terms of the search warrants and that the officers executed the warrants in a lawful manner. Testimony of other officers involved in the searches, however, shows that at least some questioned whether this extensive seizure was necessary. Officer Faler testified that he was "surprised" when Linderman told him to seize everything because "[i]t just seemed like

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[10] When Deputy Sergeant Denis called about the motorcycles at the Pettigrew residence, Linderman instructed Sergeant Denis to seize them. He gave the same answer to Deputy Bacon when he called about a motorcycle at the residence of Fillmore Cross and to Deputy Greer when he called about a motorcycle at the residence of James and Marnie Arnett. When Deputy Pennington called Linderman about the piece of concrete with the names of Hells Angels members to ask "did he want me to go through the trouble to have somebody come down with a cement saw," Linderman said to remove the piece of concrete. Linderman personally made the decision to seize the motorcycle at Ted DeMello's address when he was present at the search, and signed the inventory sheet.

there were so many items in there that had Hells Angels or – as described on the search warrant, that it just seemed like we had more than enough." Officer Tomlinson testified that "there's an implied reasonable there" and it "never occurred to me to take the motorcycle" even though it had a Hells Angels decal on it.

Linderman's primary defense is that the warrants specified the quantity and kind of evidence to be seized, and that he had no power to deviate from the explicit specifications. Linderman's argument depends on reading the word "any" in the search warrant as equivalent to "all" – and the concomitant assumption that he not only had the power to seize "all" indicia evidence, but could not lawfully exercise his discretion to seize anything less. This argument is unpersuasive. First, the word "any" in the search warrants did not mean "all." The relevant text of each search warrant itself draws a distinction between "any" and "all." While the search warrants authorized the search for "any" indicia evidence, at another point the search warrants authorized the search for "any *and all* yards, garages . . . for the following property." (emphasis added). Plaintiffs also point to the first definition of "any" in Webster's Collegiate Dictionary: "one or some indiscriminately of whatever kind, . . . one or another taken at random <ask any man you meet>." As the district court noted in denying Linderman's Motion for Reconsideration, "a directive that the search teams seize only a sampling of gang indicia from each location would have complied with the literal terms of the search warrant and would not have required Linderman to substitute his own discretion for the terms of the warrant itself."

Second, even assuming Linderman's construction of "any" as "all," while the search warrant gave Linderman

the power to instruct the officers to seize items with Hells Angels indicia, it did not mandate that he order them to seize everything complying with the literal terms of the warrant. The purpose of having a particularized, as opposed to general, warrant is to "'assure [] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'" *Groh v. Ramirez*, 540 U.S. 551, 561 (2004) (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1977)). In other words, a search warrant gives an officer the "power" to seize the items specified in the warrant. While an officer generally does not have the power to seize anything not specified in the warrant, he retains discretion over the execution of the search and, as is implicit in the word "power," can exercise discretion to leave items that may arguably come within the literal terms of the search warrant.[11]

Moreover, the record indicates that other officers understood that they had discretion not to seize some items with Hells Angels indicia. Lori Vieira's journal,

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[11] Linderman nonetheless asserts that he had no discretion. For support, he cites *Marron v. United States*, which stated that "[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant." 275 U.S. 192, 196 (1927). Linderman, however, misunderstands *Marron*. *Marron* stands for the proposition that an officer has no discretion to seize items *not* listed on a warrant meeting the Fourth Amendment's particularity requirement. As the search warrant delineates the officer's power to search, the officer has no "discretion" to exceed that power. An officer, however, does retain discretion as to how to reasonably execute a search. "It is difficult to imagine that a case could arise where an officer executing a valid search warrant would not at some stage in the matter be required in the very nature of things to exercise his judgment as to what thing or things or person or persons were to be seized under the warrant." *Strauss v. Stynchcombe*, 165 S.E.2d 302, 307 (Ga.1968).

introduced as an exhibit at her deposition, recounts a conversation during the search with Officer Garcia who supposedly said he was going to seize her "blue bus" because it had a Hells Angels sticker on it, but "decided not to." Linderman's position, however, is that the warrant *required* seizure of the bus because it had a Hells Angels decal. Similar to that position is a hypothetical raised in the district court hearing on May 28, 2002: If a Hells Angels member lived in a mansion made of stone with columns all around it and decided to write his initials on every column, would that give law enforcement officers the power to tear out a column as evidence that he lived there if the warrant authorized the seizure of any evidence proving that he did? The answer is clearly no.

The unreasonable nature of Linderman's instructions to seize all evidence of indicia is highlighted by the destruction of property caused by the seizures. In executing the warrants, the officers cut the mailbox off its post, jackhammered the sidewalk outside the clubhouse, and broke the SJHA's refrigerator. This "unnecessarily destructive behavior, beyond that necessary to execute [the] warrant[s] effectively, violates the Fourth Amendment." *Liston*, 120 F.3d at 979.

We also hold that at the time Linderman directed the officers to seize "truckloads" of Hells Angels indicia in support of a sentencing enhancement, even if it meant removing a refrigerator door, "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. At the time the warrants were served, a reasonable officer would have been aware that an unreasonable execution of a search warrant violated the Fourth Amendment. *See Liston*, 120 F.3d at 979; *see also Lawmaster*, 125 F.3d at

1349. Linderman knew that the search for indicia evidence was for the limited purpose of establishing that the Hells Angels was a gang. Despite this limited purpose, he instructed officers to seize numerous expensive motorcycles, a piece of concrete, and a refrigerator door. None of these items, not even photographs of these items, were presented at Tausan's trial.

Linderman argues that he nonetheless is entitled to qualified immunity because there is no clearly established law in this case-specific context. Linderman is not entitled to qualified immunity "simply because there [is] no case on all fours prohibiting [this] particular manifestation of unconstitutional conduct." *Headwaters Forest Def. v. County of Humboldt*, 276 F.3d 1125, 1131 (9th Cir.), *cert. denied, County of Humboldt v. Burton*, 537 U.S. 1000 (2002) (quoting *Deorle v. Rutherford*, 272 F.3d 1272, 1274-75 (9th Cir. 2001)). There need not be prior authority dealing with this precise factual situation in order to deny Linderman qualified immunity for his actions. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *Sorrels*, 290 F.3d at 970. Rather, the state of the law at the time the warrants were served must have provided Linderman with "fair warning" that his conduct was unconstitutional. *See Hope*, 536 U.S. at 741. We conclude that it did and that the unlawfulness of Linderman's conduct would be apparent to a reasonable officer.[12] Accordingly, we affirm the district court's denial of qualified immunity in this instance.

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[12] Indeed, several officers executing the search questioned whether the extensive seizure was necessary, indicating their understanding that the warrant did not *require* seizure of *all* material coming within its terms.

B. Shooting of the Dogs

We also affirm the denial of qualified immunity to the SJPOs involved in the shooting of the dogs at the Souza and Vieira residences.

"[T]he destruction of property by state officials poses as much of a threat, if not more, to people's right to be 'secure . . . in their effects' as does the physical taking of them." *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994), *overruled on other grounds, Robinson v. Solano County*, 278 F.3d 1007, 1013 (9th Cir. 2002) (citation omitted). "The killing of [a] dog is a destruction recognized as a seizure under the Fourth Amendment" and can constitute a cognizable claim under § 1983. *Id.*

Reasonableness is the touchstone of any seizure under the Fourth Amendment. Thus, to comply with the Fourth Amendment, the seizure – in this case, shooting and death – of the Vieiras' and Souza's dogs must have been reasonable under the circumstances. We look to the totality of the circumstances to determine whether the destruction of property was reasonably necessary to effectuate the performance of the law enforcement officer's duties. *See Deorle*, 272 F.3d at 1279. "A seizure becomes unlawful when it is 'more intrusive than necessary.'" *Ganwich*, 319 F.3d at 1122 (quoting *Florida v. Royer*, 460 U.S. 491, 504 (1983)). To determine whether the shooting of the dogs was reasonable, we balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citation and internal quotation marks omitted).

Here, the intrusion was severe. The officers shot and killed one of Souza's dogs, and two of the Vieiras' dogs. We

have recognized that dogs are more than just a personal effect. *See Miller v. Clark County*, 340 F.3d 959, 968 n.13 (9th Cir. 2003). The emotional attachment to a family's dog is not comparable to a possessory interest in furniture. As noted in Lori Vieira's journal, the effect of her being handcuffed just yards from where her dog Sam lay dead and bleeding was extremely traumatic.[13]

Viewing the facts in the light most favorable to the Vieras and Souza, the seizures were unreasonable, in violation of the Fourth Amendment. Most important, both entry teams had a week to plan the execution of the entry. At the Souza residence, despite advance knowledge of the presence of two guard dogs, the full extent of the plan to protect the entry team from the dogs was to either "isolate" or shoot the dogs. The officers had no specific plan for isolating the dogs. At the Vieira residence, Officer Nieves was in charge of handling the dogs. According to Officer Messier's declaration, "Officer Nieves was assigned to deal with dogs if there were any, *which is why he had a shotgun* and was first in the stacking order. However, I did not give Officer Nieves any specific instructions as to how to deal with any dogs." (emphasis added). Officer Nieves's "little plan" consisted of first hoping that the dogs would not appear at the gate. If they did, he planned to poke them through the fence with his shotgun to try and scare them.

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[13] At Lori Viera's deposition, she testified that she wrote in her journal, "I had to stand again not far from by [sic] poor dog (Sam). By now blood had drained from him and was running down the driveway. (I am crying now because I can see him, laying there, and all that blood. All that blood, for what.)"

If that did not work, he planned to "engage"[14] the dogs to ensure the safety of the entry team. In short, as the district court concluded, despite a week to plan for the entry, the officers developed no realistic plan other than shooting the dogs while serving the search warrants.

Nonetheless, the officers identify three governmental interests to justify the intrusion: (1) the law enforcement interests in accomplishing the goals of the search warrant, *i.e.*, seeking evidence of a murder; (2) the need for stealth and speed, coupled with the fact that the searches were simultaneous (in order to avoid one subject informing others); and (3) the safety of the officers.

Although the search warrants were obtained in connection with a murder investigation, none of the plaintiffs were potential suspects. The defendants were seeking a videotape and meeting minutes as evidence of the murder at the Pink Poodle. As the district court concluded, however, there was insufficient probable cause to believe that either the videotape or the meeting minutes would be found at the residences. The district court ruled that the warrants were supported by probable cause only with respect to the search for evidence with indicia of Hells Angels affiliation.[15]

The SJPOs' contention that shooting the dogs was necessary to preserve stealth is equally unpersuasive. It

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[14] At Nieves' deposition, he conceded that when he said he "engaged" the dogs, he meant that he aimed his shotgun and shot at the dogs.

[15] Again we do not review the determination that there was probable cause to search for indicia lacking any connection to the defendant, as the issue is not before us.

was the officers' own method of entry that compromised their ability to effectuate a quiet entry. At the Souza residence, the SJPOs used a ram to break down the front door before they even dealt with the dogs; at the Vieira residence, the residents were awakened not by the barking of their dogs, but rather by the four shotgun blasts discharged at the dogs. If Officer Nieves truly feared that continued barking would "alert the residents and possibly jeopardize the mission," it was an unreasonable response – indeed, an utterly irrational one – to fire four shotgun blasts to "engage" the dogs. All of the above considerations support the conclusion that the officers violated the plaintiffs' Fourth Amendment rights by unnecessarily shooting the dogs.

While the governmental interest of safety might have provided a sound justification for the intrusion had the officers been surprised by the presence of the dogs, the same reasoning is less convincing given the undisputed fact that the officers knew about the dogs a week before they served the search warrants. The officers had substantial time to develop strategies for immobilizing the dogs. They knew or should reasonably have known that the Fourth Amendment requires officers to avoid intruding more than is necessary to enforce a search warrant. *See Ganwich*, 319 F.3d at 1122. As the district court explained, the officers "created an entry plan designed to bring them into proximity of the dogs without providing themselves with any non-lethal means for controlling the dogs. The officers, in effect, left themselves without any option but to kill the dogs in the event they – quite predictably – attempted to guard the home from invasion."

Having determined that the officers violated the plaintiffs' Fourth Amendment rights for purposes of the

first step in the qualified immunity analysis, the second step asks whether the constitutional right was clearly established. As the Supreme Court has cautioned, it is not enough that there is a generally established proposition that excessive use of force is unlawful. *Saucier*, 533 U.S. at 202. "[T]he right that the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*

However, "it is not necessary that the alleged acts have been previously held unconstitutional, as long as the unlawfulness [of defendant's actions] was apparent in light of pre-existing law." *Sorrels*, 290 F.3d at 970 (citation omitted) (alteration in original). "In other words, while there may be no published cases holding similar policies unconstitutional, this may be due more to the obviousness of the illegality than the novelty of the legal issue." *Id.* In *Hope*, the Supreme Court recognized that previous cases do not have to be "fundamentally similar" and that officials can still be on notice even in novel factual circumstances. 536 U.S. at 741. Both parties concede that the ultimate question is whether the state of the law at the time was clear enough to provide reasonable officers with sufficient notice that their conduct was unlawful.

Prior to the events at issue in this case, we had held that unnecessary destruction of property in the course of executing a warrant is unconstitutional. *Liston*, 120 F.3d at 979. We also had held that the killing of a person's dog constitutes an unconstitutional destruction of property absent a sufficiently compelling public interest. *See Fuller*, 36 F.3d at 68; *see also Brown v. Muhlenberg Twp.*, 269 F.3d

205, 211-12 (3d Cir. 2001); *Lesher v. Reed*, 12 F.3d 148, 150-51 (8th Cir. 1994). We also had recognized that in assessing reasonableness under the Fourth Amendment an appropriate factor is whether the officer considered alternatives before undertaking intrusive activity implicating constitutional concerns. *See Chew v. Gates*, 27 F.3d 1432, 1440 n.5 (9th Cir. 1994); *see also Gutierrez v. City of San Antonio*, 139 F.3d 441, 450 (5th Cir. 1998).[16] These cases should have alerted any reasonable officer that the Fourth Amendment forbids the killing of a person's dog, or the destruction of a person's property, when that destruction is unnecessary – *i.e.*, when less intrusive, or less destructive, alternatives exist. A reasonable officer should have known that to create a plan to enter the perimeter of a person's property, knowing all the while about the presence of dogs on the property, without considering a method for subduing the dogs besides killing them, would violate the Fourth Amendment.

It is no doubt true, as the Third Circuit's *Brown* case hypothesized, that there are potential cases in which the state's interest may be sufficiently compelling to "justify the extreme intrusion occasioned by the destruction of the pet." *Brown*, 269 F.3d at 210-11. However, *Brown* discussed cases where dangerous animals, *e.g.*, lions, were roaming free endangering the public, not situations where officers intentionally entered into the enclosed perimeter of the property where lawfully held dogs were present to protect the property from unlawful intruders.

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[16] After the events in this case, we also applied this principle in *Headwaters Forest Defense*, 276 F.3d at 1131 (holding that the use of pepper spray was not justified when protesters could have been removed in another less intrusive manner).

Finally, this case is not the kind where the officer was reacting to a sudden unexpected situation, where the officers were confronted with exigent circumstances. The Fourth Amendment allows officers to use a certain amount of force because they are "often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving. . . . " *Graham*, 490 U.S. at 397. In this case, however, the SJPOs were given a week to plan the entry. Other than the officers' interest in preserving evidence, the officers were not presented with exigent circumstances that necessitated killing the dogs. Accordingly, the failure to develop any realistic non-lethal plan for dealing with the dogs is simply not the type of reasonable mistake in judgment to which a court should give deference in determining whether the officers are entitled to qualified immunity.[17]

In sum, in these circumstances, a reasonable officer would have known that the killing of the dogs at the Souza and Viera residences was unlawful. Thus, we affirm the district court's denial of the SJPOs' motion for qualified immunity.

AFFIRMED.

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[17] The police officers' opportunity to plan ahead distinguishes this case from the recent Supreme Court decision, *Brosseau v. Haugen*, 125 S.Ct. 596 (2004) (holding that there was qualified immunity for police officers who were considering "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight"). In this case, there was no element of surprise coloring the officers' judgment.

BEA, Circuit Judge, concurring in part and dissenting in part:

I agree with almost all of the majority opinion. For the officers here to have conducted these searches without any plan by which to control the dogs other than to shoot them is outrageous, especially given that they knew about the dogs well in advance. Clearly, a reasonable officer would have understood that his actions violated an established right of the plaintiffs. I must dissent, however, from part III.A of the majority's opinion. I would reverse the district court's order denying Deputy Sheriff Linderman qualified immunity.

Judge Ball issued several search warrants on January 20, 1998. The issue here is whether the evidence, taken in the light most favorable to the plaintiffs, establishes that Officer Linderman's instructions to seize "all" evidence covered by the search warrant violated an established constitutional right of the plaintiffs, and whether it would be clear to a reasonable officer that his conduct was unlawful in the situation Linderman confronted. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Lee v. Gregory*, 363 F.3d 931, 934-36 (9th Cir. 2004).

Here, the precise language of the warrants is important. The warrants *commanded* (not authorized) the officers to seize a very broad range of evidence in search of several crimes:

> YOU ARE THEREFORE COMMANDED, in the daytime, to make search of premises . . . for the following property:
>
> 1) A video tape or copy thereof depicting scenes and images from the Pink Poodle night club on or about August

24, 1997 in all of the described premises;

2) Any evidence of membership in, affiliation with, activity of, or identity of, any gang, including but not limited to, any reference to "Hells Angels," "HA", "Red & White," "81", "Big Red Machine", "HAMC", including, but not limited to, "West Coast OM notes," "East Coast OM notes", "BHC newsletter", including, but not limited to drawings, paintings, photographs, photograph albums, videotapes, writings, furniture, furnishings, fixtures, and objects known, or which may appear by content, to depict or contain mention of membership in, affiliation with, activity of, or identity of, any gang, including, but not limited to, the following: names, initials, and monikers of known, or which may appear by signs, and expressions known, or which may appear by content, to identify a gang or any of its members or affiliates; and identifying numbers, colors, and expressions of a geographic region with which a gang is known, or which may appear by content, to associate;

3) Notes or records of the Hells Angel meeting at the Hells Angel Clubhouse, . . . on Friday, August 29, 1997 and July through November 1996;

And if you find the same or any part thereof, to hold such property in your possession under California Penal Code Section 1536, or to release

> the property to the appropriate agency for state or federal forfeiture proceedings.

The district court denied Linderman's motion for summary judgment based on qualified immunity, reasoning that because the word "any" could be read to mean "one, some or all," Linderman had a duty to take only a representative sampling. The word "any" can mean "all" just as easily as it can mean "some." Webster's defines the word "any" as:

> 1: one or some indiscriminately of whatever kind: a: one or another taken at random <ask *any* man you meet> b: **EVERY** – used to indicate one selected without restriction <*any* child would know that>;
>
> 2: one, some, or all indiscriminately of whatever quantity: a: one or more – used to indicate an undetermined number or amount <have you *any* money> b: **ALL** – used to indicate a maximum or whole <needs *any* help he can get> c: a or some without reference to quantity or extent <grateful for *any* favor at all>;
>
> 3a: **unmeasured or unlimited in amount, number, or extent** <*any* quantity you desire> b: appreciably large or extended <could not endure it *any* length of time>.

WEBSTER'S NEW WORLD COLLEGE DICTIONARY (4th ed. 2002) (bold emphasis added). Given that Linderman was commanded to seize any evidence meeting the broad description in the warrant, he was not unreasonable in construing the warrant literally, and certainly it is not clear that a reasonable officer would have known that Linderman's conduct was unlawful in the situation he confronted. The officers were searching for evidence of a

murder, possibly gang related. This was not a traffic offense they were investigating.[1] There was also a strong suspicion that other members of the Hells Angels might have been involved in covering up evidence of the crime.

Plaintiffs do not claim that Linderman told the other officers to seize property that fell outside the scope of the warrant. The refrigerator door, the mailbox, the motorcycles, and especially the portion of the sidewalk in front of the clubhouse in which members of the Hells Angels had written their names in the concrete while it was still wet, all contained indicia of the club's existence and the composition of its membership, essential evidence to prove the gang enhancement under California Penal Code section 186.22. Neither is there any evidence that Linderman knew exactly which gang indicia would establish that Tausan was a member of the Hells Angels gang, and had committed the murder pursuant to gang activities. Tausan could well have had a nickname or used a symbol to identify himself.

The district court found that because a representative sampling of gang indicia evidence would have sufficed to prove the existence of the Hells Angels, Linderman's

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[1] The majority opinion minimizes the importance of the searches by stating: "The property here in dispute was not evidence of a crime; rather, the justification for seizing the indicia evidence was to support a sentencing enhancement against Steve Tausan." Majority Op. at 3955. The majority opinion is mistaken. The warrants read that the police were to look for "evidence of the commission of felonies, to wit: violations of (California Penal Code Section 187 (murder), Penal Code Section 211 (robbery)), and (evidence of active participation in the felonious conduct of a criminal street gang as defined in Penal Code § 186.22)." (capitalization altered).

instructions to seize "all" of the evidence were unreasonable. The district court, and the majority opinion, rule that Linderman was required to exercise discretion in deciding how much evidence was enough. The law does not impose such a burden on police officers.

In support of the proposition that police officers have a duty to seize only a sampling of indicia evidence, the majority opinion cites *Liston v. County of Riverside*, 120 F.3d 965, 979 (9th Cir. 1997) and *United States v. Apker*, 705 F.2d 293, 302 (8th Cir.), *abrogated on other grounds, United States v. Fitzgerald*, 724 F.2d 633 (8th Cir. 1983). Both cases are inapposite here.

In *Liston*, the police were sued for destruction of property and unreasonably detaining the homeowners when they executed a search warrant for a previous owner, James Rocky Hill, upon the new owners of a home, the Listons. The district court denied the officers' motion for summary judgment based on qualified immunity. This court affirmed in relevant part, holding there were material issues of fact for a jury as to whether it would be clear to a reasonable officer that the conduct of the officers who conducted the search for Hill's effects was unlawful, when the search was effected on the Listons, not Hill, the suspect named in the warrant.

The evidence produced by plaintiffs included evidence that the police had broken through their front door with a battering ram, thrown Mr. Liston to the floor injuring him, pointed a gun at Mr. Liston's face even though he was not resisting the police, and held the entire family for several minutes while the police went through the house "trashing" it. *Id.* at 970-71. The Listons offered undisputed claims that the officers destroyed the front door, broke

down the fences surrounding the backyard, dug holes in the backyard and left garbage and the Liston's personal property throughout the house. *Id.* at 972.

The Listons also produced evidence that the police did all this after the Listons informed the police that they had just purchased the house from Hill, the subject of the warrant; the police saw a "For Sale" sign in the yard which said the house had "Sold"; and, the police found the escrow papers for the sale from Hill to the Listons and Mr. Liston's driver's license. *Id.* Mrs. Liston testified that the police knew they were in the wrong house and were making jokes about it shortly after they entered the house. *Id.* at 972. In light of the evidence that the police were acting outside the scope of the warrant, this court held that such evidence raised a fact question as to whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted and precluded summary judgment based on qualified immunity. *Id.*

As the court recognized in *Liston*, it was not clear the destruction of property by itself violated a constitutional right. "[O]fficers executing a search warrant occasionally 'must damage property in order to perform their duty.'" *Id.* at 979 (quoting *Dalia v. United States*, 441 U.S. 238, 258 (1979)). "Until the officers learned that they were in the wrong house, the officers could have reasonably believed, under these precedents, that the way they conducted the search was lawful. As a result, they would be entitled to qualified immunity. But once they knew the house

belonged to the Listons, their search was no longer justified." *Id.*[3]

There is no claim that Linderman executed the search warrants at the wrong location or upon the wrong people, nor that the officers destroyed any property that did not fall within the scope of the warrant.

Apker also involved a question different from the one presented here. *Apker*, did not hold that officers have a duty to take only a representative sample of evidence described in an indicia warrant. In *Apker*, the appellants challenged the indicia warrants as violating the requirement under the Fourth Amendment that the things to be seized be described with particularity. The court in *Apker* ruled that the indicia warrants did not meet the Fourth Amendment's particularity requirement and consequently the seizure was unlawful. 705 F.2d at 297-98.

The plaintiffs here also challenged the warrants. The district court found that the affidavit supporting the search warrants was insufficient to establish probable cause to search for the videotape or meeting notes. However, the court found that the warrants were supported by probable cause for the purpose of seeking gang indicia evidence. Plaintiffs did not appeal this ruling. It is not clear whether the plaintiffs also challenged the warrants

[3] The hypothetical posed by the district court that it would have been unreasonable for an officer to cut a column off a house because it had the owners' initials on it is also inapposite. It would have clearly resulted in substantial harm to property that was not described in the warrant – the house. Here, the concrete sidewalk had the names of the members of the Hells Angels' club inscribed in it and the plaintiffs do not claim its removal caused any consequential damage. All the evidence seized or damaged fell within the scope of the warrant.

as not satisfying the particularity requirement of the Fourth Amendment, but that challenge is not raised here. Although I might well have agreed that this warrant was overly-broad on its face, that issue is not before us.

While it is true the police do not have discretion to go outside the bounds of the warrant, neither do they violate a plaintiffs' constitutional rights when they seize evidence pursuant to a valid search warrant. That is what warrants are for – to limit the evidence that can be seized and the areas to be searched. It is not the police officer's role to determine how to limit the scope of the warrant. It is the function of the independent magistrate to assure that there is probable cause to issue the warrant and that the warrant is drafted narrowly and the things to be seized are described with particularity.

Finally, there are good reasons for not requiring officers to exercise their own discretion as to how much evidence is enough. Linderman was not the deputy district attorney who would try the case and was not in a position to judge whether the trial court would admit into evidence photographs of the objects instead of the objects themselves or whether, in this era of digitally altered images, defense counsel would ridicule a photograph as tainted by police technicians, should the original object not be produced. At the time of the search, Linderman did not know what evidence would be found, how that evidence might or might not prove Tausan was a member of the Hells Angels, nor exactly what needle the district attorney might find in that haystack. Often it is only by searching through a large volume of evidence that an attorney is able to find the few crucial pieces of evidence that establish the case. It was not Linderman's role during the simultaneous

search of several residences to pre-judge what would or would not turn out to be important.[3]

Because the police were looking for evidence of a murder, and a possible gang enhancement charge, and, most importantly, because the police did not seize any evidence that was outside the scope of the warrant, I fail to see how a torn-up sidewalk, spoiled food in the refrigerator, and the loss of a mailbox rise to the level of a constitutional violation. Accordingly, I dissent from the denial of qualified immunity to Linderman.

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[3] Neither is it up to Linderman to judge the dramatic effect on a jury of the demonstrative evidence, such as the concrete sidewalk where the Hells Angels' members had signed their name.

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

THE SAN JOSE CHARTER OF THE HELLS ANGELS MOTORCYCLE CLUB, et al., Plaintiffs, v. CITY OF SAN JOSE, et al., Defendants.	Case Number C-99-20022-JF (PVT) ORDER DENYING DEFENDANT LINDERMAN'S MOTION FOR RECONSIDERATION (Filed Sep. 27, 2002)

On May 31, 2002, the Court issued an order granting in part and denying in part Defendants' motions for summary judgment based upon for qualified immunity. In that order, the Court denied Linderman's motion for summary judgment as to claims arising out of his exercise of discretion regarding items to be seized under the warrants. Linderman seeks reconsideration of this ruling. The Court has considered Linderman's moving papers, Plaintiffs' opposition and Linderman's reply. The matter was taken under submission without oral argument.

The thrust of Linderman's motion is that the search warrant required seizure of Hells Angels gang indicia; that there is no case authority imposing upon an officer the obligation to substitute his own discretion for the terms of a validly issued search warrant, that is, to "sample" gang indicia rather than seize all such indicia; and that, absent such authority, Linderman could not

reasonably have known that it was unlawful to instruct search teams to seize all gang indicia.

The warrant in question did not call for seizure of "all" gang indicia. Rather, it called for seizure of "any evidence of membership in, affiliation with, activity of, or identity of, any gang. . . ." Plaintiffs point out that the first dictionary definition of "any" is "one or some indiscriminately of whatever kind." *Merriam-Webster's Collegiate Dictionary*, online edition, http:/www.m-w.com. The second definition is "one, some, or all indiscriminately of whatever quantity."[1] *Id.* Accordingly, a directive that the search teams seize only a sampling of gang indicia from each location would have complied with the literal terms of the search warrant and would not have required Linderman to substitute his own discretion for the terms of the warrant itself. Indeed, it appears obvious that sampling was the only reasonable approach to execution of the warrant given the purpose of the search for gang indicia – to establish a link between the murder and the Hells Angels – and the sheer volume of gang indicia found at the search locations. This was not a situation in which sampling would have required Linderman to risk the non-seizure of potentially probative evidence of a crime. The seizure of some reasonable number of items from each location clearly would have been sufficient to establish a connection with the Hells Angels. Linderman could not reasonably have believed that such a connection would be

[1] Linderman points out that other definitions of "any" include the concept of "all," for example, "ALL – used to indicate a maximum of whole <needs *any* – help he can get>." *Merriam-Webster's Collegiate Dictionary*, online edition, http:/www.m-w.com.

strengthened by the seizure of truckload after truckload of items, the jack-hammering up of sidewalk cement and similar conduct.

Linderman points to the absence of case law on this precise issue, asserting that absent such case law he could not reasonably have known that his conduct was unlawful. However, recent Supreme Court and Ninth Circuit authority has clarified that qualified immunity does not attach simply because the precise conduct in question has not previously been held unlawful. *Hope v. Pelzer*, 122 S.Ct. 2508, 2515 (2002); *Sorrels v. McKee*, 290 F.3d 965, 970 (2002). The question is whether the unlawfulness of the officer's conduct was apparent in light of pre-existing law. *Id.* This Court concluded that, under the particular facts of this case, the unlawfulness of Linderman's instructions to seize *all* gang indicia was apparent given well-established principles that "unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively, violates the Fourth Amendment." *See Liston v. County of Riverside*, 120 F.3d 965, 979 (1997). The Court has not been persuaded that this conclusion was in error.

Linderman argues that, even if the Court declines to reconsider its ruling on this point, the Court should grant summary judgment with respect to the claims of individual plaintiffs at whose premises the seizures were not excessively destructive. Linderman's motion for summary judgment did not differentiate the claims of the individual plaintiffs on this ground. Accordingly, the Court cannot, based upon the record before it, grant summary judgment with respect to the claims of individual plaintiffs.[2]

[2] Nothing in the order is intended to preclude Linderman from presenting this argument by a properly noticed motion.

ORDER

Defendant Linderman's motion for reconsideration is DENIED.

DATED: 9-25-02

/s/ Jeremy Fogel
JEREMY FOGEL
United States District Judge

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NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE SAN JOSE CHARTER OF THE HELLS ANGELS MOTORCYCLE CLUB, et al., Plaintiffs v. CITY OF SAN JOSE, et al., Defendants.	Case Number C-99-20022-JF (PVT) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT ON THE GROUND OF QUALIFIED IMMUNITY [Doc. Nos. 216, 218, 224]

(Filed May 31, 2002)

Before the Court are Defendants' motions for summary judgment on the ground of qualified immunity.[1] The Court has considered the briefing submitted by the parties as well as the oral arguments presented at the hearings on April 22, 2002 (with respect to the motions of the City of San Jose Defendants) and May 28, 2002 (with respect to the motions of the County of Santa Clara Defendants). Defendants' motions will be granted in part and denied in part for the reasons set forth below.

[1] Defendant Greer also moves for summary judgment on the ground that the claims against him are time-barred.

I. BACKGROUND

This action arises out of the conduct of law enforcement personnel investigating the death of a man who was beaten to death at the Pink Poodle nightclub in San Jose on August 24, 1997. Lieutenant Robert Linderman ("Linderman") of the Santa Clara County Sheriff's Office led the investigation. He came to believe that Steve Tausan, one of the nightclub's bouncers and a member of the San Jose Charter of the Hells Angels Motorcycle Club ("the SJC"), had committed the crime. He also suspected other SJC members and associates of concealing evidence of the murder.

On October 6, 1997, Linderman applied for a warrant to search the SJC clubhouse and the residences of various individuals alleged to be affiliated with the SJC. In support of the application, Linderman submitted a twenty-seven page affidavit based upon information provided by two confidential informants as well as other law enforcement officials, including San Jose Police Officer Jorge Gil-Blanco ("Gil-Blanco"), an expert on the Hells Angels organization. Linderman also presented the live testimony of the two confidential informants. Superior Court Judge John Ball issued the warrant as requested on October 6, 1997.

On January 20, 1998, Linderman applied for a second warrant to search the SJC clubhouse and the residences of various individuals alleged to be affiliated with the SJC for: (1) the Pink Poodle security video tape; (2) "any evidence of membership in, affiliation with, activity of, or identify of, any gang, including but not limited to, any reference to 'Hells Angels,'" and (3) notes of SJC meetings of August 29, 1997 and July through November 1996.

Linderman submitted a 24-page affidavit which incorporated the statements made in his prior October 6, 1997 affidavit. Judge Ball issued the second warrant on January 20, 1998.

It is the conduct of law enforcement personnel in executing the second warrant that gives rise to Plaintiffs' claims. The warrant was executed on the morning of January 21, 1998 by the Sheriff's Office working in cooperation with several local city police agencies, including the San Jose Police Department. "Entry teams" secured each location, after which the searches and seizures were carried out. Plaintiffs assert that the officers executing the warrants acted unreasonably and in excess of their authority. Plaintiffs' operative third amended complaint alleges the following causes of action: (1) a § 1983[2] claim for violation of civil rights; (2) a claim for conspiracy to violate civil rights; and (3) a *Bivens*[3] claim for violation of civil rights.

This Court previously has made a number of rulings regarding the second warrant, including the following: (1) the warrant was supported by probable cause to search for gang indicia; (2) the warrant was not supported by probable cause to search for the Pink Poodle video surveillance tape and notes of SJC meetings; (3) Plaintiffs failed to establish that Linderman or Gil-Blanco deliberately or recklessly omitted material facts from their affidavits submitted in support of the warrant applications; and (4) Judge Ball would have issued the warrant even if he had

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[2] 42 U.S.C. § 1983.

[3] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

been informed of all the facts which Plaintiffs claim were misstated or omitted by Linderman and Gil-Blanco.

II. LEGAL STANDARD

A motion for summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears the initial burden of informing the Court of the basis for the motion and identifying the portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits which demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

If the moving party meets this initial burden, the burden shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324. A genuine issue for trial exists if the non-moving party presents evidence from which a reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the material issue in his or her favor. *Anderson*, 477 U.S. 242, 248-49; *Barlow v. Ground*, 943 F.2d 1132, 1134-36 (9th Cir. 1991).

III. DISCUSSION

The Supreme Court recently clarified the appropriate analytical framework to be applied to assertions of qualified immunity in *Saucier v. Katz*, 533 U.S. 194 (2001). After oral argument with respect to the motions of the City of San Jose Defendants, the Ninth Circuit provided

further clarification in *Sorrels v. McKee*, ___ F.3d ___, 2002 WL 1000750 (9th Cir. May 17, 2002). These decisions set forth a two-pronged inquiry. First, do the facts alleged, viewed in the light most favorable to the plaintiff, demonstrate that the defendant's conduct violated a constitutional right? *Saucier*, 533 U.S. at 201; *Sorrels*, 2002 WL 1000750, at *3. Second, if so, was that right clearly established? *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. This inquiry is wholly objective; the defendant's subjective belief as to the lawfulness of his or her conduct is irrelevant. *Sorrels*, 2002 WL 1000750, at *4.

The plaintiff bears the burden of showing that the right at issue was clearly established under the second prong of the qualified immunity analysis. *Id.* at *3. Obviously, the existence of binding precedent directly on point would suffice to meet this burden. *Id.* at *4. Absent binding precedent, the plaintiff may point to decisions of other circuit courts, district courts and state courts directly on point. *Id.* However, it is not necessary that the defendant's precise conduct have been held unconstitutional previously, so long as the unlawfulness of the conduct was apparent in light of preexisting law. *Id.* In other words, "[c]losely analogous preexisting case law is not required to show that a right was clearly established." *Id.* (internal citation and quotation marks omitted). The plaintiff need show only that the defendant's conduct "was such a far cry from what any reasonable . . . official could have believed was legal" that the defendant knew or reasonably should have known he was breaking the law. *Id.* at *5. In more pragmatic terms, the question is whether the conduct at

issue "passes the laugh test." *Id.* If so, the defendant is entitled to qualified immunity. *Id.*

A. City Of San Jose Defendants:

San Jose officers led the entry teams at four residences: the Pettigrew residence, the Souza residence, the Vieira residence and the Cook/Bozzie residence. They seek summary judgment with respect to alleged unconstitutional conduct at all four residences.

1. Pettigrew Residence

Jeffrey Pettigrew ("Pettigrew") was not at home when officers arrived at his home to execute the search warrant because he already was in police custody. It is undisputed, however, that officers at the scene did not know that Pettigrew had been taken into custody and believed that there might be persons in the home. The Pettigrew residence had been rated "high risk." The officer in charge of the entry knew that Pettigrew had prior arrests for weapons and drug charges and that loaded weapons and a bulletproof vest had been found at the home a during a prior search. Finally, the warrant being executed stated that an AK-47 assault weapon likely was on the premises. Under these circumstances, the entry team decided to use "flashbangs," distraction devices which produce approximately five pounds of pressure per square inch and emit a flash of light, a loud noise and smoke to distract potential assailants. After knocking at the door and identifying themselves, the entry team broke down the door with a ram and deployed a flashbang into the living room. The entry team moved through the house to the bedroom, where they deployed a second flashbang. As it turned out,

the house was empty. The flashbangs caused damage to Pettigrew's carpet and other property.

Based upon the record in the instant case, the Court concludes that the officers' conduct in entering Pettigrew's home did not violate Pettigrew's constitutional rights. The officers were acting pursuant to a valid search warrant. They knew that the search was related to a murder investigation; that it had been rated high risk; that the warrant provided for search of an AK-47 assault weapon; and that weapons previously had been found on the premises. Under these circumstances, the officers understandably proceeded with extreme caution.[4] Even if the Court were to conclude for purposes of analysis that Pettigrew had a constitutional right to be free from the use of flashbang devices in his home, such right was not clearly established. Plaintiffs have cited no authority setting forth the parameters for use of flashbang devices. The case cited by Defendants, *United States v. Meyers*, 106 F.3d 936 (10th Cir. 1997), states that when a Fourth Amendment claim challenges officers' use of flashbang devices, it must be determined whether the officers' conduct was reasonable under all the circumstances. *Id.* at 940. The Court concludes as a matter of law that the officers reasonably could have believed their conduct to be lawful under the circumstances. Accordingly, the officers are entitled to qualified immunity with respect to the Pettigrew search.

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[4] Such caution would have been equally warranted even had the officers known that Pettigrew was in custody, as somebody else could have been in the home.

Plaintiffs argue that the entry officers were negligent in failing to discover Pettigrew's incarceration or recklessly disregarded his incarceration, relying upon *Liston v. County of Riverside*, 120 F.3d 965 (9th Cir. 1997). In that case, law enforcement officers acting pursuant to a search warrant battered down the door of a small private residence, detained the occupants and ransacked the premises looking for drug paraphernalia. The suspected drug manufacturer who was the target of the search had sold the house, however, and couple with young children had moved in three days prior to the search. The Court reversed the district court's order granting qualified immunity to the officer who had obtained the warrant, holding that there were triable issues of material fact as to whether he had recklessly or deliberately omitted from his affidavit the information that there had been a "For Sale" sign, and later a "Sold" sign posted in front of the house. *Id.* at 974-75.

Liston is distinguishable from the present case on a number of grounds. First, the portion of the analysis relied upon by Plaintiffs, i.e., the portion addressing the significance of the "For Sale" and "Sold" signs, speaks to the obligations of an officer seeking a search warrant. The instant case addresses the obligations of officers entering a residence pursuant to a search warrant already obtained. The two types of obligations are quite different. Moreover, while in the *Liston* case there was evidence that the defendant officer had seen the "For Sale" and "Sold" signs, there is no evidence in the record that any of the officers involved in the search of the Pettigrew home knew that Pettigrew was in custody and thus not at home. Accordingly, the citation to *Liston* does not further Plaintiffs' argument.

2. Souza Residence

The entry team assigned to the home of James Souza ("Souza") knew in advance that he previously had been arrested on weapons and narcotics charges and that there were two dogs on the premises, one of which was reported to be a large rottweiler that bit without provocation. The plan was for a primary team go through the home's front door while a secondary team simultaneously entered the back yard by using bolt cutters to open a padlocked gate. The secondary team's primary responsibility was to deal with the dogs. There is no evidence, however, that the officers formed any kind of realistic plan for dealing with the dogs. The officers planned to isolate or incapacitate the dogs, but did not bring pepper spray, muzzles, tranquilizers or any items to aid them in doing so other than their weapons.

When the officers attempted to cut through the padlocked gate, a rottweiler approached on the other side, agitated and barking. A neighbor appeared and offered to take care of the dog, but the officers refused this offer and continued their attempts – ultimately unsuccessful – to cut through the padlock. The secondary team notified the primary team that they could not get through the gate and that there was a rottweiler on the loose. The primary team entered the back yard from the house, looking for the rottweiler. The officers kept their weapons drawn because their lines of sight were impaired by machinery and junk throughout the yard. The rottweiler appeared and came at the officers, at which time one of the officers shot and killed it with two bursts from MP5 automatic rifle. The second dog, which was small and nonthreatening, was unharmed.

The Court concludes that, viewing the facts in the light most favorable to Souza, Souza's Fourth Amendment rights were violated by the killing of his dog. The killing of a dog constitutes a seizure of property under the Fourth Amendment. *Fuller v. Vines,* 36 F.3d 65, 68 (9th Cir. 1994), *overruled on other grounds, Robinson v. Solana County,* 278 F.3d 1007, 1013 (9th Cir. 2002). An unreasonable killing of a dog therefore constitutes a violation of the Fourth Amendment. *Id.; see also Brown v. Muhlenberg Township,* 269 F.3d 205, 211-12 (3d Cir. 2001) (holding that it was unlawful for an officer to kill a pet that posed no imminent danger when owners were presented and wanted to assume custody). In the present case, there is evidence that the San Jose police officers who planned entry into Souza's home knew in advance that there were dogs on the premises, one of which was reported to be a large rottweiler with a propensity for biting. The officers nonetheless created an entry plan designed to bring them into proximity of the dogs without providing themselves with any non-lethal means for controlling the dogs. The officers, in effect, left themselves without any option but to kill the dogs in the event they – quite predictably – attempted to guard the home from invasion.

The Court further concludes that no reasonable officer could have believed that this "plan" for dealing with Souza's dogs was lawful. Defendants point to the absence of case law addressing this precise factual scenario, that is, the shooting of a dog by police officers executing a search warrant. *Sorrels* makes clear, however, that such case law is not necessary so long as the unlawfulness of the conduct was apparent under preexisting law. *Sorrels,* 2002 WL at *4. The Court concludes that, in light of preexisting law, a reasonable officer would have known

that it was unlawful to enter a home known to be guarded by a potentially vicious dog without making any provision for subduing the dog other than by shooting it. The Court therefore will deny the motion for summary judgment with respect to the claims arising out of the killing of Souza's dog.

3. Vieira Residence

The entry team assigned to the residence of Robert and Lori Vieira ("the Vieiras") knew in advance that the property included a residence and a junkyard completely encircled by a tall, padlocked cyclone fence and that there might be dogs roaming the area between the fence and the home. The plan was to cut the lock on the fence gate, approach the house, provide knock-notice and then enter and secure the house. Officer Nieves was assigned the duty of protecting the entry team from any dogs. It appears from the evidence in the record that the extent of his plan for dealing with any dogs was (1) hoping that no dogs would appear, (2) poking his shotgun through the fence at any dogs which did appear in an effort to scare them away and (3) as a last resort, to "engage" the dogs.

Predictably, this plan did not work out very well, at least for the dogs. The team began cutting through the lock on the fence gate. Three large dogs resembling bull mastiffs appeared and ran toward the gate, barking and growling. One dog jumped and bit at the hands of the officers trying to cut the lock. Officer Nieves struck at the attacking dog back with the barrel of his shotgun, which only made it more aggressive and agitated. He shot the dog. It went down, but a second dog stood fast and growled. Officer Nieves shot that dog twice. It retreated

with the third dog. By this time, the team was through the gate. Officer Nieves then shot the first dog, which was injured and trying to rise, a second time. Both the first and second dogs died. The third dog, and a fourth dog which had been chained in the back yard, were unharmed.

Applying the analysis set forth above with respect to the killing of the Souza's dog, the Court concludes that, viewing the facts in the light most favorable to the Vieiras, the Vieiras' Fourth Amendment rights were violated by the killing of their dogs. The Court further concludes that no reasonable officers in Defendants' position could have believed their conduct to be lawful. Accordingly, the Court will deny the motion for qualified immunity with respect to the claims arising out of the killing of the Vieiras' dogs.

4. Cook/Bozzie Residence

When the entry team assigned to the residence of Hells Angels member Ronald Cook and his companion Vickie Bozzie ("Bozzie"), only Bozzie was at home. Bozzie states that she did not hear the entry team's knock but looked out the window and saw a man in a mask. She further states that she believed the man to be a burglar and ran toward the rear of the house to call the police. An officer looking into the home through the window believed Bozzie was trying to evade the police and ordered that the front door be broken down. Officers found Bozzie in the kitchen and made her lie on the floor, where they placed her in handcuffs. She was clothed only in a thigh-length, sheer, "baby-doll" negligee. She states that she asked permission to change clothes, but was refused. According to her deposition testimony, "everything was hanging out" and "everybody was staring." She was

forced to sit, handcuffed in the negligee, for approximately twenty or twenty-five minutes before a San Jose police officer allowed her to put on some pants. She was not given anything to conceal her torso, which was clad only in skimpy, sheer fabric. At about this time the San Jose officers turned custody of Bozzie and the premises over to Santa Clara County Sheriff's deputies, who kept her in handcuffs for an additional three hours or more.

"[W]hile detentions of occupants during the period of a search will under most circumstances prove to have been reasonable, a detention may be unreasonable in a particular instance either because the detention itself is improper or because it is carried out in an unreasonable manner." *Franklin v. Foxworth,* 31 F.3d 873, 876 (9th Cir. 1994). Consequently, "[a] detention conducted in connection with a search may be unreasonable if it is unnecessarily painful, degrading, or prolonged, or if it involves an undue invasion of privacy." *Id.* Other relevant factors include the severity of the crime, whether the person being detained poses an immediate threat and whether he or she actively resists or attempts to flee. *Id.* All of these factors, as well as any other circumstances relevant to the particular case, must be considered in their totality in determining whether a detention is unreasonable. *Id.*

Applying this standard, the *Foxworth* court concluded that the police "executed the warrant in an unreasonable manner, first by removing a gravely ill and semi-naked man from his sickbed without providing any clothing or covering, and then by forcing him to remain sitting handcuffed in his living room for two hours rather than returning him to his bed within a reasonable time after the search of his room was completed." *Id.* at 876-77. The court noted that none of the officers had reason to believe

the detainee had committed a crime, that he was armed, that he presented a flight risk or that he could interfere with their search. *Id.* at 877.

For similar reasons, this Court concludes that the manner in which the San Jose officers detained Bozzie was unreasonable. She had no weapons, was not suspected of any crime, had no record and was not a member of the Hells Angels. Under these circumstances, there was no reason to inflict upon her the humiliating experience of sitting in plain view of a number of officers while handcuffed and barely clothed. The San Jose Defendants assert that they had custody of Bozzie for only the initial twenty minutes or so of her detention, and argue that a detention of such a short duration does not rise to the level of a constitutional violation. The reasonableness of the detention must be assessed under the totality of the circumstances. Even twenty minutes is a significant period of time to a person who is practically naked and feels as if she is on display to anyone who cares to look. No reasonable officer could have believed that detaining Bozzie in this manner was lawful given the circumstances of this case. The Court therefore will deny the motion for summary judgment with respect to the claims arising out of Bozzie's detention.

B. County Of Santa Clara Defendants:

1. Linderman

Linderman did not personally participate in the execution of the warrants. However, he coordinated the efforts of the various law enforcement agencies, made the initial risk-assessment with respect to each location and was available to answer questions called in by officers on

the site. Plaintiffs assert that Linderman violated their constitutional rights in two ways: instructing the search teams to exceed the scope of the warrants by unnecessarily destroying and seizing property; and making unwarranted assessments of the searches as "high risk" or "moderate to high risk."

Instructions To Search Teams

There were literally truckloads of Hells Angels indicia at the search locations, including belts, jewelry, plaques, t-shirts, hats, watches, vests, calendars, clocks, sculptures, photographs, correspondence and motorcycles. Various members of the search teams called in to Linderman, asking for guidance as to what and how much to seize. Linderman told them to seize everything. Officers on site did so, seizing everything from belt buckles to the clubhouse mailbox to motorcycles worth more than $20,000 that had Hells Angels insignia somewhere on them. In addition, they seized the door to the clubhouse refrigerator because it had a Hells Angels decal on it and removed portions of the sidewalk in front of the clubhouse with a jack-hammer because members had written their names in the cement. So much gang indicia evidence was seized that it would not fit into a normal evidence room – special offsite storage had to be rented.

Viewing the facts in the light most favorable to Plaintiffs, the Court concludes that Linderman directed that the warrants be executed in a manner which violated Plaintiffs' constitutional rights. It is well-established that "unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively, violates the Fourth Amendment." *Liston,* 120 F.3d at 979. Given the volume of

easily transportable gang indicia available at all the search locations, it clearly was unreasonable for Linderman to instruct officers, for example, to seize expensive and prized motorcycles or destroy portions of the sidewalk. No reasonable officer in his position could have believed that execution of the warrants in this manner was necessary or lawful. Accordingly, the Court will deny the motion for summary judgment as to claims arising out of Linderman's exercise of discretion regarding items to be seized under the warrants.

Risk Assessments

Linderman was responsible for assessing the "risk-factor" in executing the warrant at each location. The risk-factor dictated the level of force officers used in executing the warrant. Linderman gave a "high" or "moderate to high" assessment with respect to each location. Plaintiffs assert that assessments this high were unwarranted. As an example, Plaintiffs assert that the Linderman rated the search of the Cook/Bozzie residence as moderate to high even though Cook had not been arrested since 1977 and had never been convicted of a felony and Bozzie had no criminal record whatsoever. Plaintiffs assert that the officers on site would have used less drastic force had they not been given inflated risk assessments.

There do not appear to be any cases directly on point. Plaintiffs cite *Liston* and other cases for the proposition that police are not permitted use force beyond that necessary to execute a warrant effectively. However, it is unclear from these cases whether the application of an unduly high risk assessment could rise to the level of a constitutional violation. Even if it could, the Court

concludes as a matter of law that an officer in Linderman's position reasonably could have believed that the high risk assessments were warranted. Linderman knew that the warrants sought evidence in an investigation of a violent murder and that occupants of some of the premises had criminal records. Under these circumstances Linderman's caution in assessing the risks involved in each search was understandable and certainly passes the "laugh test." The Court therefore will grant the motion for summary judgment as to claims arising out of Linderman's risk assessments.

2. Greer

James Greer was in charge of the search team at the home of James and Marnie Arnett. Only Marnie Arnett ("Arnett") was home at the time. Greer and his team searched the premises, seizing several items for which Arnett was given a receipt, and left. Among the items seized was an album containing a hundred or more photographs. Some of these photographs depicted Hells Angels activities. Others were personal and unrelated to Hells Angels activities, including several nude photographs of Arnett. Arnett called Greer several times after the search, asking for the return of her nude photographs. Greer photocopied the nude photographs, placing the photocopies in the album where the originals had been, and returned the originals to her. Arnett asserts that seizure of her nude photographs was outside the scope of the warrant and violated her constitutional rights.

As an initial matter, Greer asserts that Arnett's claim is time-barred. The statute of limitations for § 1983 claims is one year. The conduct at issue, seizing the photo album,

occurred on the date of the search, January 21, 1998. Greer identified himself to Arnett at the time of the search and handed her a receipt bearing his name and badge number. Arnett went to the Sheriff's Office and met with Greer approximately a month after the search, on February 27, 1998, in an effort to get the nude photos back. Greer was not substituted in place of a Doe defendant until the first amended complaint was filed more than one year later, on April 9, 1999. Under these circumstances, the Court concludes that Arnett's claim against Greer is time-barred.[5]

Even if the Court were to reach the merits of Arnett's claim, the Court would conclude that Greer is entitled to summary judgment based on qualified immunity. It is unclear whether the seizure of an album containing photographs covered by a warrant becomes unconstitutional when the album also contains highly personal photographs not covered by the warrant. Plaintiffs cite *United States v. Tamura*, 694 F.2d 591 (9th Cir. 1982) for the proposition that such a seizure does rise to the level of a constitutional violation. In that case, government officials seized a file containing records covered by a warrant and records not covered by the warrant. The court rejected an argument that it would be unduly burdensome to require officers executing a warrant to sort through records at the scene, holding that "the wholesale seizure

---

[5] The Court notes that Judge Williams previously denied a motion to dismiss based upon the statute of limitations. Judge Williams' ruling with respect to the prior motion to dismiss, which necessarily was limited to the face of the pleadings, does not preclude this Court from addressing the statute of limitations argument in the context of a motion for summary judgment supported by evidence establishing that the claim is time-barred.

for later detailed examination of records not described in a warrant" was not appropriate. *Id.* at 595. The instant case does not involve the type of wholesale seizure that concerned the court in *Tamura,* however. While in that case the officials seized eleven cardboard boxes of documents, thirty-four file drawers of vouchers and seventeen drawers of cancelled checks, the instant dispute involves seizure of a single photo album. Accordingly, the facts of the present case are more analogous to cases involving seizure of a single item containing some material covered by a warrant and some not covered. *See, e.g., Davis v. Gracey,* 111 F.3d 1472 (10th Cir. 1997) (concluding no Fourth Amendment violation when defendants seized computer bulletin board containing covered and non-covered communications). Even if the Court were to conclude that seizure of the album violated Arnett's rights, a reasonable officer of Greer's position could have believed his conduct to be lawful based upon the existing legal authority. The Court therefore will grant Greer's motion for summary judgment on the ground of qualified immunity.

IV. ORDER

IT IS HEREBY ORDERED:

(1) the motions for summary judgment are GRANTED with respect to the claims arising out of the search of the Pettigrew residence, Linderman's risk assessments and Greer's seizure of the Arnetts' photograph album; and

(2) the motions for summary judgment are DENIED with respect to the claims arising out of the killing of the dogs at the Souza and Vieira

residences, Bozzie's detention and Linderman's instructions regarding execution of the warrants.

DATED: 5-31-02

/s/ Jeremy Fogel
JEREMY FOGEL
United States District Judge

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No. 05-37 & 05-45

IN THE
Supreme Court of the United States

PETER DECENA, *et al.*,

Petitioners,

-and-

ROBERT LINDERMAN,

Petitioner,

v.

THE SAN JOSE CHARTER OF THE HELLS ANGELS MOTORCYCLE CLUB, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Did the lower courts err in denying qualified immunity to Sergeant Robert Linderman, who instructed other officers executing search warrants he had obtained for Respondents' homes and clubhouse to seize "everything" constituting "Hells Angels indicia", when he knew that the sole purpose of the evidence was to prove that the Hells Angels is an ongoing organization of three or more, an element of a sentencing enhancement that was charged against a third party, resulting in the unnecessary seizure and destruction of "truckloads" of Respondents' property?

(2) Did the lower courts err in denying qualified immunity to Officers Peter Decena, William Newman, William Manion, Michael Knox, Robert Carney, Paul Messier, and Rafael Nieves, who were given a week to plan the execution of the search warrants, and learned that Respondents James Souza and Lori and Robert Vieira had large dogs in their yards, but failed to make any realistic plan to avoid shooting and killing the dogs?

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STATEMENT OF THE CASE

The Ninth Circuit's opinion accurately states the extraordinary facts of this case, with the minor exception that *none* of the evidence seized from Respondents was introduced as evidence.[1] Below, we provide additional facts that fully rebut Petitioners' arguments in favor of review. All are part of the appellate record and record cites were provided in the Consolidated Answering Brief of Appellees, filed in the Ninth Circuit on April 17, 2003.

I. Petitioner Linderman Knowingly Exceeded The Scope Of The Warrants

Sergeant Linderman drafted, signed and submitted the affidavits in support of the search warrants, as well as the warrant forms. He personally delivered these materials to a judge, who spoke to him, and then signed the warrant forms.

Linderman knew that none of Respondents was accused of a crime. He knew that the sole reason for seizing Hells Angels indicia from Respondents' homes and clubhouse was to support a sentencing enhancement charged against a third party. "[I]t was evidence towards the gang enhancement. That's what it was being seized for," Linderman confirmed during his deposition. He knew that the evidence was relevant only to prove that the Hells Angels Motorcycle Club is an ongoing organization of three or more having a common name or common identifying sign or symbol, a fact that was never in dispute.

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1. The Opinion states "the prosecution only presented a few seized photographs at Tausan's trial." Linderman's Appendix ("App.") 19. In fact, the photographs presented were not seized from Respondents, but were part of the generic collection of a San Jose Police Officer called as a Hells Angels "expert" by the prosecution.

Linderman instructed the entry and search teams how to conduct the searches before they began. He also spoke to search team leaders by phone during the searches. Several called Linderman and asked him what they should do when they saw that virtually everything Respondents own is Hells Angels "indicia," and that jack hammers would have to be used to seize some of it and trucks would have to be called to transport it if they took it all. "Take everything," search team leader Deputy Faler testified Linderman told them. *See also* deposition testimony of Deputy St. Denis, Deputy Pennington, Deputy Bacon, Deputy LeBadour, Deputy Greer, and Deputy Tomlinson.

As a result of Sergeant Linderman's direct and repeated order to do so, the search teams seized so much "Hells Angels indicia" that they could not even fit it into their normal evidence room, and were forced to rent offsite storage. In addition to the damage caused by the seizures, Respondents' property was damaged and destroyed in the process of transportation and storage, and they were deprived of its use for months. Yet not one item was introduced as evidence in the proceeding against the third party, Steve Tausan.

Even after Mr. Tausan's acquittal, Linderman and Santa Clara County refused to release Respondents' property, requiring that Respondents hire attorneys and file motions in court, which took another six months to resolve.

II. Petitioners Decena, Newman, Manion, Knox, Carney, Messier and Nieves Made No Effort, Despite The Week They Had To Plan The Raids, To Avoid Killing Respondents' Dogs

Petitioners Decena, Newman, Manion, Knox, Carney, Messier, and Nieves ("the Officers"), who were given a week to plan for the execution of the search warrants, were responsible for shooting and killing Respondents' dogs in the course thereof.

A. The Shooting Of Respondent Souza's Dog

The Officers' plan for dealing with James Souza's dog consisted of two possible options: isolate the dog or shoot it. The Officers had no intention of giving Mr. Souza the opportunity to isolate his dog. Nor did they have a plan as to how to do so themselves.

On the day of the raid, receiving no answer to their knock on the front door (as the Souzas were out of town), the team broke down the door. The team assigned to go through the side gate was unable to cut the lock on the gate, and never sought the cooperation of the neighbor with whom Mr. Souza shared the gate. While they were struggling with the lock, the Officers were approached by the neighbor , who stated, "I'll take care of the dog," or "I'll deal with the dog," but the Officers "opted not to utilize her." Instead, after entering the backyard through the house, two of the Officers proceeded to "patrol[] the yard . . . looking out for the rottweiler" with their firearms drawn, find it, and shoot it in the head with an MP-5 assault rifle twice.

B. The Shooting Of Respondents Lori And Robert Vieira's Dogs

The plan for dealing with the Vieiras' dogs amounted to (1) hoping that what the Officers called "guard dogs" would not appear when the Officers broke the lock on the Vieiras' gate and entered their yard; (2) poking at the dogs through the fence with a shotgun to try to scare them away; and then, if the dogs did not immediately retreat, (3) shooting them.

The Officers had no intention of giving the Vieiras the opportunity to comply with the warrant and avoid the destruction of their pets. Rather, the Officers planned to maintain the "element of surprise" by cutting the lock on the outer fence, approaching the house, and only then alerting the Vieiras to their presence. This plan, of course, ignored the near certainty that the Officers would have to "engage" the dogs, resulting in shot-gun blasts that would alert the Vieiras to their presence while the officers were still outside the fence.

And that is precisely what happened. When the Officers approached the Vieiras' fence, the dogs began to bark. When an Officer poked at the dogs through the fence with his shotgun, the dogs did not retreat. When the Officers stuck their hands through the fence to cut the lock, the dogs snapped at their hands. Officer Nieves aimed his shotgun and fired at one of the dogs.

When Mr. Vieira appeared on his balcony in his underwear, having been aroused by the shot, "[h]e was instructed to stay where he was." According to one of the Officers, "tactically, it would not have been proper to allow him to come outside and get the dogs." (The "tactic" referenced was never explained.) So, before the team went

through the gate, Officer Nieves shot a second dog twice, critically wounding it. When the team began to enter the yard, the first dog tried to get up, so Nieves fired a fourth shot into its head, killing the helpless dog.

C. Non-Lethal Alternatives Available

Petitioners and other San Jose Police Officers confirmed during their depositions that it is the policy and practice of the San Jose Police Department to try to avoid shooting animals if at all possible. The Officers testified that there are many ways to avoid shooting dogs, some of which, including the following, they had used successfully in the past:

1. Allowing The Dog's Owner Or Caretaker To Control The Dog

According to Officer Manion:

> San Jose Police Officers try to avoid shooting animals if at all possible. . . . For example, if the dog cowered or moved away or if the dog's owner was present to put the dog into a room, it would not be necessary to shoot the dog.

See also Officer Fernandez (Q: "Have you also participated in search warrant executions where the owners or residents of the home corralled the dogs and got them out of your way? A: That's our first choice, yes.").

When Mr. Souza's neighbor entreated the Officers to let her "take care of [his] dog," the Officers "opted not to utilize her," choosing instead to shoot and kill it. When Mr. Vieira appeared on his balcony as the Officers shot the first of his

dogs, "[h]e was instructed to stay where he was." Had the Officers followed their usual practice, they would have allowed the caretaker and the owner to control the dogs. The Officers' only explanation for not doing so -- "maintain[ing] the element of surprise" – is utterly specious when one considers the noise made by a rifle shot.

2. Using The Pepper Spray The Officers Carry

San Jose Officers were quick to point out that there are other non-lethal means of dealing with belligerent dogs as well, including the use of pepper spray. Officer Nieves, who shot the Vieiras' dogs, admitted that he had pepper spray with him on January 21, 1998. He provided no explanation for not using it.

3. Chasing The Dog Away Or Into An Enclosure

San Jose Officers also testified that they have dealt with dogs they encountered in the past by shouting at them or chasing them away, or into some enclosure. No explanation was offered as to why this non-lethal option was not planned for or utilized in this case.

4. Utilizing An Animal Control Officer

Finally, Officers pointed out that one of the non-lethal options available to them is to call upon a humane officer or someone else trained to immobilize dogs. Officer Decena testified that the Officers did not think of doing so in this case until after the dogs were killed.

ARGUMENT

Petitioners do not contend that the Ninth Circuit's decision conflicts with a decision from another Circuit. Nor do they contend that the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Rather, Petitioners assert that the Ninth Circuit misapplied a properly stated rule of the law. Specifically, Petitioners argue that the Ninth Circuit relied on an impermissibly broad and general statement of "clearly established" law, a prong of the qualified immunity analysis. In fact, it is Petitioners who seek to draw distinctions between this case and firmly established precedent that are far too fine. A reasonable officer in Linderman's and the San Jose Officers' positions would have known that his conduct violated Respondents' Fourth Amendment rights.

I. Sergeant Linderman Violated Respondents' Clearly Established Fourth Amendment Rights

A. The Scope of the Warrants

Long before January 20-21, 1998, when Linderman obtained the warrants and directed the searches at issue here, it was understood that the Fourth Amendment proscribes searches and seizures that exceed a warrant's scope. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 17-19 (1968) ("This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope.") (citing *Kremen v. United States*, 353 U.S. 346 (1957); *United States v. Di Re*, 332 U.S. 581, 586-87 (1948); *Go-Bart Importing Co. v. United States*,

282 U.S. 344, 356-58 (1931)); *United States v. Tamura*, 694 F.2d 591, 594 (9th Cir. 1982); *United States v. Penn*, 647 F.2d 876, 882 n.7 (9th Cir. 1990); *VonderAhe v. Howland*, 508 F.2d 364, 369-70 (9th Cir. 1975).

"In determining whether or not a search is confined to its lawful scope, it is proper to consider both the purpose disclosed in the application for a warrant's issuance and the manner of its execution." *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1979); *see also Terry*, 392 U.S. at 19 ("The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."); *VonderAhe*, 508 F.2d at 369 ("What is 'overly broad' cannot be resolved in an abstract or academic manner but only in relation to the facts, circumstances under, and the purpose for, which the warrants were issued."). The reviewing court must also scrutinize the particular purpose of a search when considering whether it was necessary to damage property during the search's execution. *Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997) ("[B]ecause the touchstone of the constitutionality of an officer's conduct during a search is reasonableness, when executing a search warrant, an officer is limited to conduct that is reasonably necessary to effectuate the warrant's purpose."); *Ayeni v. Mottola*, 35 F.3d 680, 689 (2d Cir. 1994) ("Among the issues that must be resolved at trial are not only the extent of physical force and intrusive measures employed during the search, but whether such measures were justified by the purposes of the search."), *abrogated on other grounds by Wilson v. Layne*, 526 U.S. 603 (1999); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 804 (1994) ("Greater intrusiveness requires greater justification.").

Sergeant Linderman sought "any evidence of membership in [sic] affiliation with, activity of, or identity of, any gang, including but not limited to, any reference to 'Hells Angels'" to prove the sentencing enhancement codified in California Penal Code section 186.22, which was alleged against a third party. California Penal Code section 186.22(b) provides that a defendant is eligible for a three-year sentence enhancement when the prosecution proves that the defendant committed the crime of conviction "for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members." Cal. Pen. Code § 186.22(b). Section 186.22(b)(1) specifies that the provision has three separate elements: (1) the existence of a "criminal street gang"; (2) a conviction for a felony committed for the benefit of, at the direction of, or in association with that gang; and (3) that the crime of conviction was committed with the specific intent to promote, further, or assist in criminal conduct by gang members.

Proof of the first element, the existence of a "criminal street gang," itself requires proof of three separate elements: (1) an ongoing organization, association or group of three or more persons, whether formal or informal, which has a common name or common identifying sign or symbol; (2) having as one of its "primary activities" the commission of one or more of the predicate offenses specified in section 186.22(e); and (3) whose members individually or collectively engage in a "pattern of criminal gang activity." Cal. Pen. Code § 186.22(f); *see also People v. Louen*, 17 Cal. 4th 1, 18 (1997). In its Order of July 13, 2001, the district court rejected Plaintiffs' challenge to the legality of the searches for Hells Angels indicia, finding that Defendants had probable cause to search because such evidence would have helped to make out the first of the three elements of the "criminal street gang" sentencing enhancement, that the

Hells Angels is an ongoing organization of three or more which has a common name or common identifying sign or symbol. (Plaintiffs/Respondents have reserved their right to appeal this order.)

To prove this first element of the sentencing enhancement, one need only look at the substantial admissible evidence in the public domain, including Respondents' website and United States Patent & Trademark Office filings. In Mr. Tausan's case, the prosecution proved it by calling San Jose Police Officer Jorge Gil Blanco as an "expert" on the Hells Angels. Officer Gil Blanco, who had been surveilling San Jose Charter members and their associates for more than eight years without ever making an arrest, showed the jury generic pictures of Hells Angels and public displays of their trademarked name to establish that the group has a common name, identifying sign or symbol. None of the property seized from Respondents was used to prove anything at all.

B. The Inadequacy Of Linderman's Case For Exceeding the Scope of the Warrants

Petitioner Linderman avoids discussing the necessity for seizing "truckloads" of Respondents' property, instead arguing that he was "commanded" to do so by the language of the warrant. This is nonsense.

The warrants call for "any" Hells Angels indicia to prove California Penal Code section "186.22". Identical language is used in Linderman's Affidavit in support of the warrants. Linderman admitted at his deposition that he knew the reference was to section 186.22(b), the sentencing enhancement, which had been charged against a third party. He knew that the evidence was relevant merely to prove that

the Hells Angels is an ongoing organization of three or more having a common name or common identifying sign or symbol.

The first definition of "any" in Merriam Webster's Collegiate Dictionary is "one or some indiscriminately of whatever kind." This is consistent with the way in which a reasonable officer in Sergeant Linderman's position would have interpreted the term, particularly when he learned how much "indicia" there was, and that Respondents' property would be damaged and/or destroyed if the officers were to seize it all. *See Andersen v. Maryland*, 427 U.S. 463, 480 (1976)(law enforcement officers must read ambiguous phrases in warrants to only authorize the search for and seizure of evidence related to the purpose for which the warrant was obtained).

Linderman, in contrast, chose to act unreasonably, and now asks the Court to find that he had no choice because the *third* definition of "any" in Merriam Webster's is "all." While this argument might work for a search team member who had not read the affidavit in support of the warrants and did not know the limited purpose for which the evidence was sought, it does not work for Linderman. Linderman did not just read the affidavit, *he wrote it. See Groh v. Ramirez*, 540 U.S. 551, 561-564 (2004) (officer who wrote the warrant affidavit and warrant forms could not escape liability by blaming the authorizing magistrate). He knew the limited purpose for which the evidence was sought. In directing the searchers to go beyond what was necessary to fulfill this purpose, he violated Respondents' Fourth Amendment rights.

Dissenting Judge Bea argues that the majority "minimizes the importance of the searches." Linderman's

App. 34 n.1. Judge Bea points out that the warrants refer to "felonies" and California "Penal Code 186.22," without specifying the subsection. *Id.* Subsection 186.22(a) makes it a felony to actively participate in a criminal street gang. Subsection 186.22(b) is the sentencing enhancement. But all this is beside the point. Linderman knew that the evidence was pertinent only to the sentencing enhancement. His affidavit in support of the warrants did not even attempt to establish probable cause as to the crime. The Complaint filed against Steve Tausan prior to the searches alleged the sentencing enhancement and not the crime. Linderman confirmed that he was going for the "enhancement" and not the crime during his sworn deposition. Thus, while it might be theoretically possible for an officer to believe, based on the warrant, that he was searching for evidence of a crime, Linderman could not have and did not believe this.

Respondents heartily agree with Judge Bea that the warrants might be overbroad. But that hardly absolves Linderman, who was responsible for drafting, obtaining and serving them. He had actual knowledge of the limited purpose for which the evidence was sought, actual knowledge that the officers conducting the searches had found more than enough, and he nevertheless gave the order: "Take everything."

Linderman's attempt to twist the Fourth Amendment's particularity requirement into a mandate that officers act more intrusively than necessary is wholly unpersuasive. The purpose of the particularity requirement is to prevent general searches and to "assure[] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Groh v. Ramirez*, 540 U.S. at 561. Neither of these purposes would be served by requiring officers to seize everything conceivably included within a warrant's coverage, even when it is unnecessary

to fulfill the purpose for which the evidence was sought. To impose such a requirement would be to create a "new rule," not the reverse. As the Ninth Circuit had found in a case decided 12 years before Linderman issued the order to "take everything" in this case, "[t]he fact that the officers did not seize all of the materials permitted by the warrant does not mean that they possessed the type of unfettered discretion that violates the fourth amendment." *United States v. Hayes*, 794 F.2d 1348, 1356 (9th Cir. 1986), *cert. denied*, *Hayes v. U.S.*, 479 U.S. 1086 (1987).

Finally, it is Linderman and not the Ninth Circuit whose interpretation of the law is "unworkable" in practice. No reasonable officer would believe that a trial judge would permit the prosecution to introduce into evidence 115 patches, 65 wall plaques, a Pepsi machine, a refrigerator, a Bud Lite pool table light, a safe, a cash register, a display case with a Death's Head sticker on it, a mail box, a street sign, nine cardboard boxes full of t-shirts, a door, posters, road signs, paintings, magazines and a concrete slab – and that's just what was seized from the clubhouse – plus a dozen Harley Davidson motorcycles and scores of items similar to those listed above that were seized from Respondents' homes. The Ninth Circuit has not created a "new rule" requiring officers to make nuanced tactical distinctions best left to an attorney, as Linderman argues. Linderman has been held accountable for failing to apply the judgment and common sense that the Fourth Amendment requires any reasonable officer entrusted with executing a search warrant to apply.

Linderman's motion for summary judgment based on qualified immunity was properly denied.

II. Officers Decena, Newman, Manion, Knox, Carney, Messier, and Nieves Violated Respondents' Clearly Established Fourth Amendment Rights

It was well established at the time the Officers shot Respondents' dogs that the shooting of a dog by a police officer is a seizure for Fourth Amendment purposes and is thus subject to the "reasonableness" test. The Officers had a week to plan the execution of the search warrants in this case. San Jose had a policy and practice of avoiding shooting dogs if at all possible, and these officers had managed to avoid shooting dogs in other cases. Yet they made no realistic plan other than to shoot Respondents' dogs. Their conduct was, as Judge Bea aptly put it, "outrageous." "Clearly, a reasonable officer [in these Officers' position] would have understood that his actions violated an established right of the plaintiffs." The Officers' App. 31 (Bea, concurring).

The Officers' effort to distinguish the numerous cases confirming this principle by arguing that none of them involved the shooting of a dog *while executing a warrant* is specious. If anything, the cases, which involved the shooting of dogs encountered by officers while on patrol or on an emergency call, highlight the unreasonableness of the Officers' conduct in this case. There were no exigent circumstances here. These officers were not faced with a split second decision. They had *a week* to plan for their encounter with the dogs. If officers responding on a moment's notice are required to act reasonably, these Officers certainly were.

The Officers' motion for summary judgment based on qualified immunity was properly denied.

CONCLUSION

The lower courts acted properly in denying Petitioners' motions for summary judgment based on qualified immunity. Petitioners' conduct was unreasonable and it would have been clear to an officer in these officers' positions that it was unreasonable. This Court should deny Linderman's and the San Jose Officers' Petitions for Writs of Certiorari.

Respectfully submitted,

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